86-982

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM T. HANTON,

Petitioner,

v.

ROBERT E. KENNEDY, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may bar the submission of motions for summary judgment after a stated date, consistently with Rule 56(b) of the Federal Rules of Civil Procedure, which provides that a party against whom a claim is asserted may move for a summary judgment in his favor "at any time."

2. Whether a district court may bar the submission of a motion for summary judgment that is based on a defendant's claimed right to qualified immunity, on the ground that such a motion was not submitted by a deadline set by the district court for the submission of dispositive motions, where the basis for such a motion was not apparent until the district court issued its ruling on a prior timely motion for summary judgment, in which the district court

articulated for the first time the theory of constitutional deprivation which gave rise to the subsequent motion for summary judgment invoking the doctrine of qualified immunity.

PARTIES BELOW

This action was commenced on October 26, 1982 in the United States District Court for the Northern District of Ohio, by plaintiffs Robert E. Kennedy, Jr. and Joyce Kennedy, against defendants City of Cleveland, the Cleveland Police Department, the Mayor of Cleveland, George V. Voinovich, the then Chief of Police of Cleveland, William T. Hanton (petitioner herein), Jose Feliciano, the then Chief Assistant Prosecutor of Cleveland, and eight police officers employed by Cleveland, John Riley, Raymond Offutt, John Darrah, Joseph Lewandowski, Richard Brindza, John Joyce, Frank Wszelaki and Mark Romph. The following are no longer defendants: George V. Voinovich, Jose Feliciano, Richard Brindza, John Joyce and Mark Romph.

On appeal before the Court of Appeals for the Sixth Circuit, William T. Hanton and Frank Wszelaki were appellants and the two plaintiffs were appellees.

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OPINIONS BELOW

The District Court's Order, filed on February 12, 1985, denying petitioner's motion for summary judgment. A copy of said Order is appended hereto at page A-2.

The District Court's Judgment Entry

and Memorandum Opinion, filed on October 2, 1985, striking from the record petitioner's supplemental motion for summary judgment. A copy of said Judgment Entry and Memorandum Opinion is appended hereto at page A-33.

The decision of the United States Court of Appeals for the Sixth Circuit, issued on July 30, 1986, rehearing denied on August 27, 1986, reported at 797 F.2d 297.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit dated July 30, 1986, rehearing denied on August 27, 1986, pursuant to 28 U.S.C. § 1254(1).

Petitioner contends that the decision appealed from conflicts with the express terms of Rule 56(b) of the Federal Rules of Civil Procedure, as well as with the case of Manetas v. International Petroleum Carriers, Inc., 541 F.2d 408 (3d Cir. 1976), and decided a federal question in a way in conflict with this Court's opinion in Mitchell v. Forsyth, 105 S. Ct. 2806 (1985), thus rendering review appropriate pursuant to the criteria set forth in Rule 17.1(a) and (c) of the Supreme Court Rules.

STATUTE INVOLVED

This action involves the effect of Rule 56(b) of the Federal Rules of Civil Procedure, which provides as follows:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. (Emphasis supplied.)

STATEMENT OF THE CASE

The original Complaint, filed on October 26, 1982 under 42 U.S.C. §§ 1983, 1985 and 1986, alleged that plaintiff, Robert E. Kennedy, Jr. ("Kennedy"), was arrested, attacked and beaten by a number of Cleveland police officers on several occasions on October 27, 1981. The Complaint did not allege that petitioner was in any way personally involved in the alleged conduct. The Complaint further alleged that an internal investigation of Kennedy's allegations, which was conducted by two other Cleveland police officers, resulted in a failure to recommend that disciplinary charges be brought against the accused officers and that such charges were not brought, thereby finding that those officers had acted properly. The Complaint alleged

that the failure to bring such charges was pursuant to a policy of the City of Cleveland.

On November 1, 1984, after extensive discovery by the parties, several defendants, including the petitioner herein, filed motions for summary judgment. In his motion, petitioner argued that the only fact claimed by Kennedy, in his responses to defendants' interrogatories, in support of his allegation that supervisory officials of Cleveland knew of the alleged City policy, was that petitioner, as its Chief of Police, "knew or should have known" that Kennedy was mistreated, and took no disciplinary action against the accused officers. Petitioner's Statement of Reasons in support of his motion for summary judgment argued that even if it were assumed that the internal

investigation of Kennedy's allegations and the decision not to administratively prosecute the accused officers constituted a "cover up" of their alleged misconduct, Kennedy was not deprived of any federal rights as a result, since any deprivations were complete as of the date of the alleged assaults.

In its Order of February 12, 1985, the District Court denied petitioner's request for a summary judgment, stating that a genuine and material issue of fact existed as to whether petitioner was a party to a "post-assault cover-up conspiracy."[1] The District Court,

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1 The District Court also held that petitioner, as the chief supervisory officer of Cleveland's police force, could be held liable under 42 U.S.C. § 1983, along with the City itself, for a "single, unusually brutal or egregious beating," a theory rejected by this Court in City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985).

acknowledging that "Kennedy must demonstrate a constitutional tort caused by the alleged post-assault cover-up conspiracy separate from the constitutional torts arising from the alleged beatings," held that the alleged conspiracy could have caused a constitutional tort, i.e., a denial of "Brady" material to Kennedy in the criminal trial of the charges against him. It was the District Court's view that the internal investigation resulted in the taking of statements of witnesses to an alleged post-arrest beating of Kennedy at which the arresting officers were either present, or participated in or gave encouragement to, and that such statements constituted "Brady" material because the persons who gave the statements could have given testimony at the criminal trial of Kennedy which was

relevant to the credibility of the arresting officers.

On September 24, 1985, petitioner filed a supplemental motion for summary judgment. In that motion, petitioner raised, for the first time, his claim to qualified immunity, pointing out that he could not have reasonably known that participating in the alleged "post-assault cover-up conspiracy" would deprive Kennedy of "Brady" material. His supporting Statement of Reasons incorporated a prior Application for Clarification filed on February 26, 1985, in which were indicated a number of reasons for the invalidity of the "Brady" material theory set forth in the District Court's

Order of February 12, 1985.[2]

On October 2, 1985, the District Court filed its Judgment Entry striking petitioner's supplemental motion for summary judgment from the record. In its supporting Memorandum Opinion filed the same date, the District Court stated, incorrectly, that petitioner's November 1, 1984 summary judgment motion "sought relief based in part upon immunity" and that his supplemental motion for summary judgment was filed without the leave of the District Court.

Petitioner took an interlocutory appeal from the District Court's October 2, 1985 ruling, on the basis of the holding of this Court in Mitchell v.

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2 In its Feb. 12, 1985 Order, the District Court stated that any motions for reconsideration of its rulings would be denied summarily.

Forsyth, 105 S. Ct. 2806 (1985). The Sixth Circuit Court of Appeals, in its decision of July 30, 1986, reported at 797 F.2d 297, held that the District Court had properly set November 1, 1984 as a deadline for the filing of dispositive motions, and that petitioner's supplemental motion for summary judgment, having been filed after the deadline set by the District Court, was properly denied by the District Court for not having been timely filed.[3]

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3 The Court of Appeals alternatively stated that while it was "difficult" to do so, it was "not impossible" to read petitioner's Nov. 1, 1984 summary judgment motion as a claim of immunity, 797 F.2d at 304, and that his time for appeal from its denial passed without the noticing of an appeal. In fact, however, nothing in the Nov. 1, 1984 motion invoked the doctrine of qualified immunity because nothing in the Complaint asserted the "post-assault cover-up" constitutional tort theory stated in the District Court's Feb. 12, 1985 ruling.

On August 13, 1986, petitioner asked the Court of Appeals for a rehearing, on the ground that the constitutional deprivation theory relating to the alleged "cover-up" had not been asserted, either in the Complaint or in any other manner, at the time the November 1, 1984 summary judgment motion was made, and that such a theory was not only never asserted in the Complaint, but was unforeseeable.[4]

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4 Indeed, it is highly significant that even Kennedy's Amended Complaint, which was filed on Sept. 24, 1985, contained no allegation that the alleged "cover-up" deprived him of a constitutional right to "Brady" material.

ARGUMENT

Two important issues are presented by this petition regarding the availability of summary judgment procedures by the chief of a large metropolitan police force in an action against him under 42 U.S.C. § 1983. First, whether a District Court may properly limit the time in which a defendant may seek a summary judgment, despite the express provision of Rule 56(b) of the Federal Rules of Civil Procedure that such a motion for a summary judgment may be made "at any time . . . ." See Manetas v. International Petroleum Carriers, Inc., 541 F.2d 408, 413 (3d Cir. 1976) (pretrial order limitation for filing summary judgment motions not a bar to later filing in light of express authorization in Rule 56(b) for a

defendant to move "at any time"). In this case, the Court of Appeals' approval of the District Court's refusal to consider the merits of petitioner's supplemental summary judgment motion, on the ground that it was not filed within the time set forth in the District Court's pretrial order, was directly contrary to the express language of Rule 56(b).

Second, whether a District Court may effectively deny a defendant the opportunity to move for summary judgment on the ground of qualified immunity by requiring such a defendant to file a motion therefor at a time prior to the emergence of the legal basis for such a motion. In this case, the District Court created such a "Catch-22" situation because the basis upon which petitioner sought qualified

immunity, i.e., that no reasonably competent official could have perceived his conduct to deprive a person in Kennedy's position of a constitutional right to "Brady" material, had not been asserted by the time of the District Court's November 1, 1984 deadline for the filing of dispositive motions. Indeed, it was not fully articulated until February 12, 1985, when the District Court hypothesized that such a constitutional tort could have inhered in petitioner's alleged participation in the alleged "post-assault cover-up conspiracy" in connection with the internal police investigation of Kennedy's allegations. The fact that the Complaint alleged no such deprivation rendered it impossible for petitioner to anticipate such a deprivation theory when he filed his

summary judgment motion in compliance with the District Court's deadline.[5] The acceptance of the District Court's rationale for refusing to consider the merits of petitioner's claim of qualified immunity effectively deprived him of the right to the pretrial ruling and interlocutory appeal mandated by Mitchell v. Forsyth, supra.

The rulings of the courts below, in refusing to consider petitioner's motion for summary judgment on the basis of qualified immunity, was contrary to the purpose of the procedures set forth in Rule 56. As this Court recently stated, "[o]ne of the principal purposes of the summary

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5 Even afterwards, when he filed an amended complaint on Sept. 24, 1985, Kennedy advanced no such claim, thus confirming the unpredictability of the District Court's hypothesis.

judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think that it should be interpreted in a way that allows it to accomplish this purpose." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). The decisions below denied petitioner the right to use the summary judgment rule, contrary to the plain language of Rule 56(b).

For the reasons stated above, petitioner respectfully requests that this Honorable Court grant a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Petition were mailed this 25th day of November, 1986 to each of the following:

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RULE 56(b),
FEDERAL RULES OF CIVIL PROCEDURE

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. KENNEDY, JR., et al.,	)	
Plaintiffs,	)	CASE NO. C82-2932
vs.	)	
CITY OF CLEVELAND, et al.,	)	ORDER
Defendants.	)	

Plaintiffs filed a complaint on October 26, 1982, alleging a series of civil rights violations against a number of defendants, including the City of Cleveland, George Voinovich, William Hanton, Jose Feliciano, John Riley, Raymond Offutt, John Darrah, Joe Lewandowski, Richard Brindza, Lt. Joyce, Frank Wszelaki, Mark Romph.

Summarized briefly, the plaintiff Robert Kennedy claims initially that he was beaten at the time of his arrest for

a traffic offense by defendants Riley and Offutt, and again at the Cleveland Police Department. Complaining of injury, Kennedy was subsequently transported to Metro Hospital where he was subjected to additional beatings by defendants Darrah and Lewandowski with the acquiescence of Riley and Offutt. Following Kennedy's release from custody, he alleges that he went into a deep coma and was hospitalized in intensive care for eleven days as a result of the beatings.

A second claim raised by Kennedy relates to the allegation that a post-assault cover-up conspiracy involving the defendants Hanton, Brindza, Wszelaki, and Romph, resulted in additional constitutional torts. Kennedy was charged with a series of offenses including a traffic light

violation, two assaults, resisting arrest, and possession of a concealed weapon, i.e., a knife. Kennedy's wife filed a claim of police brutality asserting that Kennedy had been seriously injured as the result of the arresting process.

The Cleveland Police Department caused an investigation of the conduct of Riley, Offutt, Darrah and Lewandowski, to be conducted by the Professional Conduct and Internal Revenue Unit (PCIR) of Cleveland's police force. Defendants Romph and Wszelaki, members of the PCIR Unit, took numerous statements from police officers and personnel at Metro Hospital as part of the investigation. Sergeant Wszelaki filed a report summarizing the investigation and recommended that no disciplinary action be taken against any

of the police officers in the alleged beating of Kennedy. After a conference was held following the receipt of Wszelaki's recommendation which was attended by Jose Feliciano and Patrick Roche, police prosecutors for the City of Cleveland's Law Department, and Wszelaki, no action was taken against any of the police officers.

Subsequently, a lengthy jury trial was conducted in Cleveland Municipal Court on the criminal charges brought against Kennedy. At the close of the government's case, the presiding trial judge, upon motion of the defendant Kennedy, entered acquittals on the two assault charges and the charge of carrying a concealed weapon. Thereafter, in return for the defendant's no contest plea to the minor misdemeanor of disorderly conduct, the

remaining charges of the traffic light violation and resisting arrest were dismissed by the prosecution.

The defendant George Voinovich is the Mayor of the City of Cleveland, and the defendant William Hanton is the Chief of Police for the City of Cleveland.

The defendant Richard Brindza is a sergeant in the Cleveland Police Department who had supervisory authority over Riley, Offutt, Darrah, and Lewandowski on the evening in question.

In February, 1983, the Court dismissed Jose Feliciano, the Cleveland Police Prosecutor who oversaw the prosecution of Kennedy.

Lt. Joyce was an officer with supervisory power over Riley, Offutt, Darrah and Lewandowski, and was joined as a defendant. However, he was

dismissed by an agreement of counsel for the plaintiff and Joyce on October 31, 1984.

Presently pending before the Court are a series of motions which the Court will now address.

I. THE MOTIONS OF THE DEFENDANTS CITY OF CLEVELAND, GEORGE VOINOVICH, WILLIAM HANTON, RICHARD BRINDZA, JOHN RILEY AND RAYMOND OFFUTT FOR A DISMISSAL OF PLAINTIFF ROBERT E. KENNEDY'S CLAIM BROUGHT PURSUANT TO THE PROVISIONS OF 42 U.S.C. §§1985 and 1986.

The Court by orders filed June 24, 1983, has previously dismissed Kennedy's claim brought pursuant to 42 U.S.C. §§1985 and 1986 against the defendants Joyce, Romph, Wszelaki, Darrah, and Lewandowski. The reasoning upon which the §1985, and §1986 claims were dismissed against the latter defendants is equally applicable to the moving defendants. Hence, the motions of the above-named defendants to dismiss

Kennedy's claims brought pursuant to 42 U.S.C. §§1985 and 1986 are sustained.

II. PENDING MOTIONS FOR ATTORNEY'S FEES.

There are presently pending before the Court a number of motions for attorney fees. One such motion was filed by counsel for the plaintiffs for fees required to oppose the City's interlocutory appeal to the Court of Appeals for the Sixth Circuit which was dismissed.

In opposing the motion for fees, the City cites Buian v. Baughard, 687 F.2d 859, 861 (6th Cir. 1982), and the fact that no costs were allowed by the Court of Appeals for the proposition that plaintiff's application is premature. The Court agrees.

Other motions are pending for fees for sanctions. The Court will hold all

such motions in abeyance, subject to further order of the Court.

III. PLAINTIFFS' MOTION FOR LEAVE TO FILE WSZELAKI DEPOSITION TRANSCRIPT EXCERPTS AND CORRESPONDING PAGE REFERENCES IN BRIEF.

Good causing having been shown, leave is granted.

IV. PLAINTIFFS' MOTION FOR LEAVE TO PERMIT FILING OF SIGNATURE AND CHANGES OF THE DEPOSITIONS BEING FILED FOR PURPOSES OF PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

Good causing having been shown, leave is granted.

V. DEFENDANT CITY OF CLEVELAND'S MOTION FOR PROTECTIVE ORDER QUASHING NOTICE TO TAKE DEPOSITION OF PATRICK ROCHE, FIRST ASSISTANT PROSECUTOR OF THE CITY OF CLEVELAND.

The motion is granted with the condition that none of the defendants will be permitted to present, as a witness in their behalf, the testimony of Patrick Roche.

VI. THE PLAINTIFFS' MOTION FOR LEAVE TO DEPOSE JOSE FELICIANO AND TO COMPEL THE DEFENDANT WSZELAKI TO ANSWER QUESTIONS HE REFUSED TO ANSWER AT HIS DEPOSITION AND FOR THE COURT TO RECONSIDER ITS EARLIER DECISION WITHHOLDING SIX DOCUMENTS FROM THE PLAINTIFFS ON THE BASIS OF THE ATTORNEY-CLIENT PRIVILEGE.

Upon consideration, the motions are overruled.

VII. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' RESPONSE TO CITY'S REQUEST FOR SUPPLEMENTATION OF ANSWERS TO INTERROGATORIES, AND FOR AWARD OF ATTORNEY'S FEES PURSUANT TO RULE 11, FEDERAL RULES OF CIVIL PROCEDURE.

Upon consideration, the motion is denied.

VIII. THE PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF ITEM NO. 12 OF OCTOBER 4, 1983 SUBPOENA AND LEGIBLE COPIES OF CERTAIN DOCUMENTS PREVIOUSLY PRODUCED.

No response having been filed to plaintiffs' motion, and no indication having been provided the Court that the defendant City of Cleveland has complied with the spirit of the motion, or that the City has responded to item no. 12 of

the October 4, 1983 subpoena, the motion is granted. Plaintiffs' request for reasonable attorney fees will be held in abeyance.

Defendant City of Cleveland is ordered to comply with discovery requests by February 22, 1985 or show cause why the Court should not consider appropriate contempt proceedings.

IX. PLAINTIFFS' MOTION FOR ORDER COMPELLING DEFENDANT VOINOVICH TO COMPLY WITH COURT ORDER BY ANSWERING INTERROGATORIES, FOR REASONABLE EXPENSES INCLUDING ATTORNEYS' FEES AND FOR ADDITIONAL SANCTIONS.

The motion to compel is now moot as the defendant Voinovich responded to interrogatories one day after the above-motion was filed. The motion for reasonable expenses including attorneys' fees shall be held in abeyance until the conclusion of these proceedings.

X. THE PLAIINTIFFS' FEBRUARY 1, 1985, MOTION TO DEPOSE DEFENDANT VOINOVICH.

The Court has previously denied plaintiffs' request to proceed with deposition on oral examination of the defendant George Voinovich, Mayor of the City of Cleveland. Upon further consideration of the issue, including the plaintiffs' brief in support of the motion, including the letter to the editor of the Cleveland Plain Dealer submitted by John D. Maddox, Law Director of the City of Cleveland, and upon consideration of the answers and objections to interrogatories submitted to the defendant Voinovich, the motion is denied.

XI. MOTION OF THE DEFENDANTS CITY OF CLEVELAND, GEORGE VOINOVICH, WILLIAM T. HANTON AND RICHARD BRINDZA FOR AN ORDER STRIKING THE DEPOSITION EXCERPTS FILED BY PLAINTIFFS IN OPPOSITION TO DEFENDANTS' SUMMARY JUDGMENT MOTIONS.

The above-motion was filed on February 4, 1985, and relates to excerpts of depositions taken of the defendant Hanton, the ex-defendant Joyce, and McNamara. Counsel for the plaintiffs are granted leave to file an opposition brief by February 22, 1985.

INTRODUCTION TO SUMMARY JUDGMENT MOTION RULINGS

The Court has for its consideration a series of motions for summary judgment being prosecuted by the defendants City of Cleveland, Voinovich, Hanton, Brindza, Romph and Wszelaki.

Kennedy claims §1983 violations by not only the four officers directly involved in his beatings, defendants Riley, Offutt, Darrah and Lewandowski, but also that the City of Cleveland bears responsiblity by virtue of a series of theories including poor

training, a pattern of indifference to police misconduct which fosters the type of police misconduct alleged in this action, official participation in a post-assault conspiracy to cover-up the activities of the offending officers, the existence of conflict of interest situation between the City's duty to identify and stifle police misconduct and the City's finanical stake in avoiding judgments against its individual police officers because the City's collective bargaining agreement with the police union requires the City to indemnify the individual officers for judgments rendered against police officers.

The plaintiffs charge that Voinovich and Hanton should be held liable because of their supervisory responsibilities with respect to the police department.

Romph and Wszelaki are charged with participation in the alleged post-assault cover-up conspiracy. Brindza, as the immediate supervisor of the four defendants alleged to have directly participated in the several assaults, is also joined as a defendant.

XII. THE CITY OF CLEVELAND'S MOTION FOR SUMMARY JUDGMENT.

The motion of the City of Cleveland for a summary judgment is denied. In consideration of Cleveland's motion, the Court has read the transcript of Kennedy's criminal jury trial, examined the written statements of many of the employees of Metro Hospital taken by Romph and Wszelaki, the statements of the many police officers interviewed by Romph and Wszelaki, the affidavits filed by the parties, and studied the lengthy briefs filed by opposing counsel.

The Court's review of the materials submitted has been conducted against the background of Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978), which reversed Monroe v. Pape, 365 U.S. 167 (1961) and held that local governments such as municipalities are persons within the meaning of 42 U.S.C. §1983. However, Monell emphasized that respondeat superior is not a permissible theory for holding a local government body liable for constitutional violations of its employees. Rather, a local government is liable under §1983 when "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers can be causally related to the allegedly unconstitutional conduct of the employees." See Monell, p. 2036. As

previously indicated, Kennedy attempts to hold the City of Cleveland in this case by resorting to a number of theories of liability, acknowledging that the concept of respondeat superior does not pertain to the §1983 claims. The decision in Monell has led to the development of a substantial body of case law with regard to the question of whether the local government is liable for the constitutional torts of its employees. However, an exhaustive review of the case law is unnecessary at this time as the only issue before the Court is whether defendant City's motion for summary judgment should be sustained.

The Court finds that this is the type of case, viewed in a light most favorable to the plaintiffs, described in the case of Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir. 1980) where it

was held:

> . . . (W)e agree that, absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force. . . . However, a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference or "gross negligence" on the part of the officials in charge. See Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979) . . . (emphasis added).

Additionally, the Court is of the view that the recent decisions of the Ohio Supreme Court in Haverlack v. Portage Homes, 2 Ohio St.3d 26 (1982) and Strohofer v. Cincinnati, 6 Ohio St.3d 118 (1983), require that the City's motion for summary judgment be

overruled with respect to the state pendent actions.

XIII. MOTION OF THE DEFENDANT VOINOVICH FOR SUMMARY JUDGMENT.

A study of the materials presented in support of and in opposition to Mayor Voinovich's motion for summary judgment fails to disclose any legal basis upon which Mayor Voinovich could be held liable either personally or in his individual capacity. The motion of the defendant George Voinovich for summary judgment against the plaintiffs is granted.

XIV. MOTION OF THE DEFENDANT HANTON FOR SUMMARY JUDGMENT.

Chief Hanton is the chief supervisory officer of the Cleveland Police Department. Given the Court's analysis as set forth with respect to the denial of the City's motion for summary judgment, it follows that the

trier of fact could find with respect to plaintiff Kennedy's claims growing out of the alleged assaults that Hanton's alleged failures with respect to training and disciplining had a causal relationship to Kennedy's injuries suffered as a result of the alleged beatings. Furthermore, with respect to the post-assault cover-up conspiracy, a trier of fact could find, based upon the materials presented, that the defendant Hanton was a party to the conspiracy. Stated in the language of summary judgment motion practice, the Court finds genuine issues of material fact exist. Thus, the defendant Hanton's motion for summary judgment is denied.

XV. MOTION OF THE DEFENDANT BRINDZA FOR SUMMARY JUDGMENT.

Sergeant Brindza was working in a supervisory capacity on October 27,

1981, as to defendants Riley, Offutt, Darrah, and Lewandowski. Brindza had contact with Kennedy at the arrest scene, at the jail, and at Metro Hospital. At no time did Kennedy complain to Brindza about police misconduct. Brindza did not observe any police misconduct. There is no evidence that Brindza was present during any of the alleged violations of Kennedy's civil rights. With respect to Kennedy's prosecution, Brindza's role was limited to recommendations to Riley as to the charges to be filed based upon Riley's report of Kennedy's conduct.

Brindza sprayed mace upon Kennedy at the arrest scene. However, no claim is advanced by Kennedy that he was injured by reason of the application of mace.

No claim was advanced that Brindza was a part of the alleged post-assault

cover-up conspiracy.

The mere fact that Brindza had supervisory authority over Riley, Offutt, Darrah, and Lewandowski, on the evening of the alleged assaults is insufficient to predicate liability on the part of Brindza without more. In sum, the submission as to Brindza's motion for summary judgment, fails to demonstrate, viewed in a light most favorable to Kennedy, that Brindza was either directly responsible for or personally participated in the alleged deprivation of Kennedy's constitutional rights. See Smith v. Heath, 691 F.2d 220 (1982).

The motion of the defendant Richard Brindza for summary judgment is granted.

XVI. MOTION OF DEFENDANT ROMPH FOR SUMMARY JUDGMENT.

Kennedy's case against Romph and

Wszelaki is limited to the allegation that both officers, as members of the PCIR Unit of the police department, participated in the alleged post-assault cover-up conspiracy. Romph attests that after he engaged in interviewing witnesses and obtaining written statements from the witnesses, his participation in the investigation was concluded in that he did not make a recommendation nor participate in the presentation of the information developed to the police prosecutors. In an attempt to defeat Romph's motion for summary judgment, counsel for Kennedy argue that the investigation conducted by Wszelaki and Romph was flawed in a number of respects.

The Court finds no merit in plaintiffs' contentions. The Court finds no genuine issue as to any

material fact as to Romph's motion. Viewing the submission in a light most favorable to the plaintiffs, the Court finds Romph's motion for summary judgment to be well taken and grants the same.

XVII. MOTION OF DEFENDANT WSZELAKI FOR SUMMARY JUDGMENT.

As a threshold matter, in order for Kennedy to defeat Wszelaki's motion for summary judgment, Kennedy must demonstrate a constitutional tort caused by the alleged post-assault cover-up conspiracy separate from the constitutional torts arising from the alleged beatings. Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), Landrigan v. City of Warlick, 628 F.2d 736 (1st Cir. 1980). Kennedy asserts that the additional consititutional torts include false arrest, false imprisonment,

malicious prosecution, abuse of process, and a failure to turnover Brady material in connection with Kennedy's criminal trial.

The alleged police beatings of Kennedy occurred on October 27, 1981. Wszelaki's final report recommending no disciplinary action against the accused officers was approved in January of 1982. Kennedy's trial did not commence until June 14, 1982. Wszelaki and Romph did not investigate the criminal charges against Kennedy, but rather the claim that Riley, Offutt, Darrah and Lewandowski had assaulted Kennedy. Moreover, the criminal process with respect to Kennedy had been initiated prior to the Wszelaki-Romph investigation.

The issue distills to consideration of whether evidence exists to support

Kennedy's claim that the alleged post-assault cover-up conspiracy had as a goal the continued and unjustified prosecution of Kennedy as a counter-measure to Kennedy's brutality countercharges against officers of the police department. In that respect, plaintiffs claim that the City of Police Prosecutors delivered no Brady material notwithstanding the fact that numerous hospital employees had provided information in the Wszelaki-Romph investigation charging Cleveland Police officers with brutality under circumstances where a trier of fact could find that Riley and Offutt, the arresting officers of Kennedy, had either participated, witnessed, or given encouragement to the alleged hospital beating of Kennedy. The defendants scoff at the notion that the statements

obtained by the Wszelaki-Romph investigation constitute Brady material. This Court has read the transcript of the criminal trial of Kennedy and disagrees. The credibility of Riley and Offutt was in issue during Kennedy's criminal trial. The statements obtained by Wszelaki and Romph from the hospital personnel were, if believed, sufficient to place in issue the credibility of Riley and Offutt as to the claim that Kennedy attacked Riley at the arrest scene. For instance, if the trier of fact were to find that Riley and Offutt or either one of them had participated, encouraged, or observed police brutality directed toward Kennedy at Metro Hospital, then the trier of fact might well conclude that Riley and Offutt's testimony at the criminal trial was not worthy of belief.

In sum, the Court concludes that defendant Wszelaki's threshold challenge to plaintiff's post-assault conspiracy charge fails upon the determination that additional constitutional torts may be established as a result of the alleged post-assault cover-up conspiracy.

Unlike Romph, Wszelaki made the recommendation that no disciplinary action be taken against any of the police officers alleged to have engaged in police brutality. The recommendation was discussed with the police prosecutors who later prosecuted Kennedy. In view of the nature and dissemination of Wszelaki's recommendation, the Court finds that a trier of fact could reasonably find that not only did a post-assault cover-up conspiracy exist, but that Wszelaki participated in the conspiracy. So

finding, Wszelaki's motion for summary judgment is denied.

CONCLUSION

The defendant City of Cleveland has successfully prevented the plaintiffs from taking the depositions of police prosecutors Feliciano and Roche. The Court will not allow either Feliciano or Roche to testify if called as witnesses by any of the defendants unless Feliciano and Roche are hereafter made available for discovery deposition by the plaintiffs. The Court restates this ruling for emphasis in view of the Court's announced finding, based upon the materials submitted in support of and in opposition to the motions for summary judgment, that a basis exists for the plaintiff Robert Kennedy to assert that a post-assault cover-up conspiracy existed with respect to his

alleged continued and unjustified prosecution and that such conspiracy gave rise to additional constitutional torts committed against Kennedy separate from the alleged beatings. In the event the trier of fact would find a conspiracy to have existed, and that Feliciano and Roche, or either one of them, was a member of the conspiracy, neither Feliciano, formerly a defendant in this action, nor Roche, could be held liable because of the rule of law respecting absolute immunity for prosecutors. However, it remains an open question in the Court's view as to whether the defendant City of Cleveland is subject to liability for the alleged post-assault constitutional torts.

In the event defendant City of Cleveland, upon further reflection, now finds it appropriate to call as its

witness either Feliciano or Roche, it must so notify counsel for the plaintiffs by February 22, 1985 and make available Feliciano and Roche for discovery depositions at a time convenient to all concerned with the understanding that the discovery depositions shall be completed by March 22, 1985. Failure of the defendant City of Cleveland to so notify and make available Feliciano and Roche for discovery deposition will foreclose the presentation of Feliciano and Roche as witnesses on behalf of the defendants.

The management of this case has required an extraordinary amount of the Court's time. Consequently, any motions filed by any party for reconsideration of the rulings herein stated will be denied summarily.

IT IS SO ORDERED.

/s/David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. KENNEDY, JR., et al.,	)	
Plaintiffs,	)	CASE NO. C82-2932
vs.	)	
CITY OF CLEVELAND, et al.,	)	JUDGMENT ENTRY
Defendants.	)	

For the reasons stated in the Memorandum Opinion filed contemporaneously herewith, IT IS ORDERED, ADJUDGED, AND DECREED that the defendant Wszelaki's motion filed October 1, 1985, seeking the Court's reconsideration of his November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

Further for the reasons stated in the Memorandum Opinion filed

contemporaneously herewith, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Hanton's motion filed September 24, 1985, and styled as a "supplement" to the defendant's November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

/s/David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. KENNEDY, JR., et al.,	)	
Plaintiffs,	)	CASE NO. C82-2932
vs.	)	
CITY OF CLEVELAND, et al.,	)	MEMORANDUM OPINION
Defendants.	)	

The defendant William Hanton, Chief of the Cleveland Police Department, and the defendant Frank Wszelaki, a sergeant in the Cleveland Police Department, filed motions on September 24, and October 1, 1985, respectively, without leave of court, seeking reconsideration of the Court's February 12, 1985, order denying their separate motions for summary judgment, based on part upon a claim of immunity.

This is an action prosecuted pursuant to the provisions of 42 U.S.C. § 1983. Plaintiffs filed a complaint on October 26, 1982, alleging a series of civil rights violations against a number of defendants, including the City of Cleveland, William T. Hanton, John Riley, Raymond Offutt, John Darrah, Joe Lewandowski, and Frank Wszelaki.

Summarized briefly, the plaintiff Robert Kennedy claims initially that he was beaten at the time of his arrest for a traffic offense by defendant Riley and Offutt, and again at the Cleveland Police Department. Complaining of injury, Kennedy was subsequently transported to Metro Hospital where he was subjected to additional beating by defendants Darrah and Lewandowski with the acquiescence of Riley and Offutt. Following Kennedy's release from

custody, he alleges that he went into a deep coma and was hospitalized in intensive care for eleven days as a result of the beatings.

A second claim raised by Kennedy relates to the allegation that a post-assault cover-up conspiracy involving the defendants Hanton, and Wszelaki, resulted in additional constitutional torts. Kennedy was charged with a series of offenses including a traffic light violation, two assaults, resisting arrest, and possession of a concealed weapon, i.e., a knife. Kennedy's wife filed a claim of police brutality asserting that Kennedy had been seriously injured as a result of the arresting process.

The Cleveland Police Department caused an investigation of the conduct of Riley, Offutt, Darrah and

Lewandowski, to be conducted by the Professional Conduct and Internal Revenue Unit (PCIR) of Cleveland's police force. Defendant Wszelaki, a member of the PCIR Unit, took numerous statements from police officers and personnel at Metro Hospital as a part of the investigation. Sergeant Wszelaki filed a report summarizing the investigation and recommended that no disciplinary action be taken against any of the police officers even though a number of hospital personnel at Metro Hospital gave statements implicating some of the Cleveland police officers in the alleged beating of Kennedy. After a conference was held following the receipt of Wszelaki's recommendation which was attended by police prosecutors for the City of Cleveland's Law Department, and Wszelaki, no action was

taken against any of the police officers.

Subsequently, a lengthy jury trial was conducted in Cleveland Municipal Court on the criminal charges brought against Kennedy. At the close of the government's case, the presiding trial judge, upon motion of the defendant Kennedy, entered acquittals on the two assault charges and the charge of carrying a concealed weapon. Thereafter, in return for the defendant's no contest plea to the minor misdemeanor of disorderly conduct, the remaining charges of the traffic light violation and resisting arrest were dismissed by the prosecution.

Sergeant Wszelaki and the Chief of Police of the Cleveland Police Department have each been sued in both their individual and official capacity. Based upon the recent ruling of the

United States Supreme Court and Brandon v. Holt, 53 U.S.L.W. 4122, it is apparent that if either Hanton or Wszelaki are liable in their official capacity to the plaintiff, then a judgment against either on that basis would be the basis for a judgment against the City of Cleveland, also a defendant in this case. Brandon v. Holt also teaches that the defense of immunity, be it complete or qualified, does not apply where a governmental official is sued in his official capacity. However, in this case, both Hanton and Wszelaki are also sued in their individual capacities.

Both defendants, by way of November 1, 1984 motions for summary judgment, sought relief based in part upon immunity. In his answer Hanton set up immunity as a defense. Wszelaki alleged

as a defense that his actions were taken in good faith, but he did not allege immunity as a specific defense. Hanton's affidavit filed in support of his motion for summary judgment at paragraphs 9 and 10 appears to rely upon the defense of qualified immunity. A similar conclusion can be reached by reading paragraph 9 of Wszelaki's affidavit filed in support of his motion for summary judgment. On February 12, 1985, the Court denied the Hanton-Wszelaki motions for summary judgment. The defendants have now asked without leave of court, on the eve of trial, a reconsideration of the summary judgment motions. Hanton describes his September 24, 1985, motion as a "supplement" to his prior November 1, 1984 motion for summary judgment.

This case had already been delayed

by an unsuccessful interlocutory appeal taken by the City of Cleveland.

Further delay occurred upon the Court's declaration of a mistrial on April 19, 1985, after eight days of a jury trial. The Court recognized that a conflict of interest existed for Assistant Cleveland Law Director Irving Berger who was attempting to represent in the same trial the interests of the defendant Sergeant Wszelaki and the City of Cleveland. Sergeant Wszelaki had testified for more than a day and it became apparent during his testimony on cross examination that he was relying, inferentially with respect to the defense of qualified immunity, on policies established by the City of Cleveland, and alleged by plaintiffs to form a basis for their claims against Cleveland, for his conduct in the

internal investigation of the plaintiff Robert Kennedy's claims of police brutality. Given the opportunity to state that he wished separate counsel, Sergeant Wszelaki chose that option. Thereafter, counsel of Wszelaki' choice stated to the Court that they were unable to proceed with the trial and counsel for the plaintiff indicated opposition to a bifurcation during trial of their claims against Wszelaki. The Court then declared a mistrial and promptly rescheduled this case for re-trial on October 7, 1985.

A flurry of motions filed by the defendants followed and again on September 17, 1985, the Court ruled on the various motions and once again declared that the case would proceed to trial on October 7, 1985, as previously ordered on April 14, 1985.

Between the granting of the mistrial on April 19, 1985, and the motions for reconsideration, the United State Supreme Court in a decision published in June of 1985 in Mitchell v. Forsyth, 53 U.S.L.W. 4798, granted the right of interlocutory appeal in actions brought pursuant to 42 U.S.C. § 1983 where the claim of qualified immunity raised upon a motion to dismiss or upon a motion for summary judgment has been denied.

It is apparent that since the Court's ruling in February of 1985 denying Hanton and Wszelaki's motions for summary judgment on the basis of immunity, these defendants have had the right to an interlocutory appeal to the extent their motions for summary judgment were predicated upon the claim of immunity. The first question that arises is whether that right to an

interlocutory appeal continues for more than a period of thirty days from the ruling from which an appeal is being taken. It is apparent to the Court that such a question has occurred to counsel for the defendant Hanton and Wszelaki. Hence the "motions to reconsider" or "to supplement" the motion for summary judgment. The Court knows of no authority for a motion to reconsider and none has been cited. When the Court ruled on a variety of motions on February 12, 1985, including Hanton and Wszelaki's motion for summary judgment, the Court declared that it would summarily strike any motions for reconsideration. (This case has already generated over 450 separately docketed motions, briefs, orders, etc.) When the Court declared a mistrial in April of 1985, after eight days of trial, it once

again discouraged the re-filing of more motions as had been the case. However, the Court noted that it would accept timely filed motions from new counsel for the defendant Wszelaki.

If one were to take the position that neither Wszelaki nor Hanton could have known in February that they had the right to an interlocutory appeal because the decision in Mitchell v. Forsyth had not been announced, even by that analysis the right to take the interlocutory appeal began with the decision in Mitchell v. Forsyth which was handed down on June 19, 1985.

The Court will not consider the Wszelaki motion to reconsider the motion for summary judgment. No leave was sought to file the motion for reconsideration six days before the stated date for the new trial to

commence. In an oral hearing conducted on October 2, 1985, no good cause was shown for the inordinate delay. Additionally, the Court had the benefit of listening to Wszelaki's testimony for a lengthy period during the trial in April of 1985. The Court is reluctant to attempt to accurately summarize that testimony. Such a summary depends first upon the Court's recollection unaided by reference to a transcript. As the Court recalls, the gist of Wszelaki's testimony with respect to his internal investigation of the alleged beating of Kennedy at the hospital was to the effect that the statements, in writing, of the challenged police officers were as a matter of policy taken to be truthful and worthy of belief in the face of contradictory evidence by civilian witnesses--even though the

police officers refused to consent to face-to-face interviews and despite the fact that the civilian witnesses, who offered testimony to the effect that Kennedy was beaten while handcuffed and seated in a wheel chair being escorted by hospital personnel, were questioned extensively in face-to-face interviews by the "question and answer" method by Wszelaki. In sum, the trier of fact could reasonably conclude from the testimony of Wszelaki that he was knowingly part of a process designed to cover up police misconduct toward Kennedy.

In sum, the Court finds no good cause for it to reconsider its denial in February of 1985, of the defendant Wszelaki's motion for summary judgment to the extent it was based upon the claim of immunity. The defendant

Wszelaki's motion filed October 1, 1985, seeking the Court's reconsideration of his November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

As for the defendant William Hanton, the Court finds no good cause shown for it to reconsider its February 12, 1985, order denying Hanton's motion for summary judgment or in the alternative for it to allow the defendant Hanton to "supplement" his November 1, 1984 motion for summary judgment. The defendant Hanton's motion filed September 24, 1985, and styled as a "supplement" to the defendant's November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

This case will proceed to trial as ordered on October 7, 1985.

IT IS SO ORDERED.

/s/David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

86-982

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM T. HANTON,

Petitioner,

v.

ROBERT E. KENNEDY, JR., et al.,

Respondents.

SUPPLEMENTAL APPENDIX
PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Sixth Circuit

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CERTIFICATE OF SERVICE

Three copies of the foregoing Supplemental Appendix were mailed this 10th day of December, 1986 to each of the following:

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RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

Nos. 85-3819/3827

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT E. KENNEDY, JR.; JOYCE KENNEDY,
Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, ET AL.,
Defendants,

WILLIAM T. HANTON (85-3819),
FRANK WSZELAKI (85-3827),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed July 30, 1986

Before: ENGEL, KEITH and MILBURN, Circuit Judges.

ENGEL, Circuit Judge. The Supreme Court in *Mitchell v. Forsyth,* 105 S. Ct. 2806 (1985), held that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an immediately appealable "final decision" within the meaning of 28 U.S.C. § 1291[1] notwith-

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[1]Section 1291 provides, "The courts of appeals . . . shall have jurisdiction of all final decisions of the district courts of the United States . . . ."

standing the absence of a final judgment. These consolidated appeals raise important issues concerning whether the right to take an immediate interlocutory appeal is conditioned upon the filing of a timely notice and further whether the right itself can be subject to waiver for noncompliance with reasonable temporal limitations placed by the district court upon the filing of motions seeking immunity.

We answer both questions in the affirmative.

I.

With respect to the right to take an immediate appeal prior to trial, the Supreme Court in *Mitchell* extended to the holders of qualified immunity the same rights it had previously accorded individuals who claimed absolute immunity. *Mitchell,* 105 S. Ct. at 2815-16. In principle, the Supreme Court held that absolute or qualified immunity, once established, not only protects the holder against ultimate personal liability in damages but also from the onerous burdens of defense in much the same way that the Double Jeopardy Clause and the Speech and Debate Clause afford immunity from prosecution.

> The conception animating the qualified immunity doctrine as set forth in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' " *Id.,* at 819, 102 S.Ct. at 2738, quoting *Pierson v. Ray,* 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967). As the citation to *Pierson v. Ray* makes clear, the "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial—distraction of officials from their

> governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816, 102 S.Ct. at 2737. Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Id.*, at 817, 102 S.Ct. at 2737.

Mitchell, 105 S. Ct. at 2815. As both *Mitchell* and *Harlow* make clear, a claim of immunity raises an interest in an early, and inexpensive, termination of the litigation.

Mitchell v. Forsyth, as we read it, counsels the trial courts to consider three different and relatively independent aspects of immunity. In addition to the historic right to be immune from ultimate liability in damages, *Mitchell* contemplates two stages at which the doctrine of immunity may be interposed in advance of trial to avoid two distinct burdens of litigation. A defendant may initially raise immunity as a bar to litigation in a motion to dismiss. Where a defendant official is entitled to qualified immunity the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity.[2] *Mitchell*, 105 S. Ct. at 2816. Next, *Mitchell* holds that "even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the

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[2]The rules permitting notice pleading and granting the liberal use of amendments are not otherwise affected by our ruling. *See* Fed. R. Civ. P. 8(f), 12(b)(6); *Ott v. Midland Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *see also Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); Fed. R. Civ. P. 15; *Howard v. Kerr Glass Mfg. Co.*, 699 F.2d 330 (6th Cir. 1983).

defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a general issue as to whether the defendant in fact committed those acts." *Id.*[3]

Therefore, it is possible that the progress of civil rights actions brought under 42 U.S.C. § 1983 may be interrupted by not one but two interlocutory appeals. First, if the pleading itself is insufficient the defendant may file a motion to dismiss and upon denial thereof take an immediate appeal. Because *Mitchell* contemplates that the defendant is to be also protected from the burdens of discovery until the resolution of that issue, *Mitchell* necessarily holds that the court is further obligated, upon application, not only to refrain from proceeding to trial but to stay discovery until that issue is decided. 105 S. Ct. at 2816; *see also Harlow*, 457 U.S. at 818. If the complaint sufficiently alleges actions outside the scope of the official's immunity, the defendant still retains the right to file a motion for summary judgment so that the further harassment of going to trial may be avoided. If, however, summary judgment predicated on a claim of immunity is denied, it is once more possible to appeal from an adverse ruling on the Rule 56 motion and to obtain a stay of trial pending a resolution of that issue on appeal. Finally, if summary judgment is denied and the trial court's decision is not appealed, or is appealed and affirmed, the case then proceeds to trial. *Mitchell* makes it clear that the immunity doctrines' protections against liability and against the various burdens of litigating insubstantial claims are conceptually distinct. *Mitchell*, 105 S. Ct. at 2816. Consequently, decisions with respect to dismissal or summary judgment, if adverse, do not

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[3]The same, of course, holds true where a plaintiff either fails to allege violations inside the scope of a defendant official's absolute immunity, or alleges the commission of such violations but, after discovery, fails to raise a genuine issue of fact as to whether the defendant committed those acts. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

preclude the interposition of the defense of immunity as a defense to liability on the merits.

All interlocutory appeals, whether as exceptions to the finality rule as in 28 U.S.C. § 1292 or within the collateral order doctrine of *Cohn v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), are of course subject to abuse. Even when employed in good faith, these rules are bound to create delay and inconvenience both to the plaintiff and to the court. We see no reason, therefore, why such rules, as advantageous as they may be, are not subject to the same rules of waiver and procedural default as have been traditionally applied to other cases.

We note in the first instance that neither absolute nor qualified immunity is recognized so much as a matter of inherent right in the person claiming it as it is the result of the application of historical principles which reflect a proper balance between the protection of the rights of individuals to be free from constitutionally violative harm and the very real need of persons charged with governmental duties to get on with its business without harassment or intimidation.[4] We also note that immunity, whether qualified or absolute, is an affirmative defense which must be affirmatively pleaded; it is not a doctrine of jurisdictional nature that deprives a court of the power to adjudicate a claim. *Mitchell*, 105 S. Ct. at 2816; *Gomez v. Toledo*, 446 U.S. 635 (1980); *Harlow*, 457 U.S. at 815 n.24. Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense. And since certain of the interests protected by the doctrines of immunity are conceptually distinct, and all of them are procedurally distinct, the failure to plead immunity may, at

[4]We recognize also that some immunity, most notably the President's absolute immunity for all acts within the outer perimeter of his duties of office, arises in part from constitutional grounds. *See Nixon v. Fitzgerald*, 457 U.S. 731, 748-54 (1982) (separation of powers element to presidential immunity).

different stages of the litigation, work either a partial or complete waiver. Hence, we conceive it possible that one might assert immunity as an affirmative defense to the complaint and thus as an affirmative defense to ultimate liability without putting in issue his or her right to be free of subjection to trial or, before that, to the burdens of discovery.

It also follows that the right is one which can be lost by failure timely to assert it.[5] In this respect we believe that, to maintain control of his docket and to assure the expeditious advancement of cases, it is entirely proper for a trial judge in such cases as this to establish a time for the filing of motions challenging the sufficiency of the pleadings, during which discovery will be stayed unless good cause can be shown to the contrary. *See In re Paper Antitrust Litigation*, 685 F.2d 810, 817-18 (3d Cir. 1982). Plainly, if the trial judge places reasonable limits upon the time within which to challenge the sufficiency of the pleadings, the failure of the defendant to take advantage of the opportunity can and should normally work a waiver of the right, at least absent some appealing reason for making an exception. In like fashion judges have historically been allowed to limit both the extent and the time for taking discovery. Limitations upon discovery are a common and necessary part of limiting the cost to the parties and assuring the orderly progression of the case to trial. Thus, it is also entirely proper for courts in cases such as this, to fix reasonable times for the completion of discovery and thereafter reasonable times in which motions for summary judgment are to be filed.[6] Given this, it seems

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[5]Even the exercise of constitutional rights may be limited by procedural rules. *See, e.g., Wainright v. Sykes*, 433 U.S. 72 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982); *Lockett v. Arn*, 750 F.2d 407, 410 (6th Cir. 1984); *Barker v. Ohio*, 328 F.2d 582, 584 (6th Cir. 1964).

[6]Although Fed. R. Civ. P. 56(b) states that a defendant may move for summary judgment "at any time," we do not believe that this precludes the district court from controlling the proceedings before it, at least not to the extent of requiring it to consider disruptive motions

logical to us also that the trial judge retains discretion not only to set cut off dates for recovery but to cut off motions for summary judgment, even those which may challenge the plaintiff's right to go to trial on the basis of an absolute or qualified immunity. The quid pro quo is obvious: in exchange for the defendant's right to interrupt the judicial process, the court may expect a reasonable modicum of diligence in the exercise of that right.

By the same token, once it is determined that a given order is appealable under law, we see no good reason for not imposing the same temporal limitations that are applicable generally to the perfection of appeals. Thus, if the order is appealable at all, it must be appealed within the time set by law, here thirty days, or the right must be considered to have been waived. Fed. R. App. P. 4(a); *Moorer v. Griffin*, 575 F.2d 87, 89 (6th Cir. 1978). As with other appeals, there are of course certain permissible exceptions which we address later, but we observe that they are no greater nor less than those accorded appeals from final orders generally. Thus, motions for reconsideration must themselves ordinarily be timely filed in order to interrupt the passage of the thirty day time for appeal. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978). And the filing of an untimely motion will not toll that time. Motions brought under Rule 60(b) are likewise subject to limitation, and the untimely filing of those motions deprives the trial court and appellate court of the jurisdiction to entertain them. *Bank of Cal., N.A. v. Arthur Anderson & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983). Similarly, motions

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on the eve of trial. *See Management Inv. v. UMW*, 610 F.2d 384, 389 (6th Cir. 1979); *Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 548 (9th Cir. 1985); *U.S. Dominator v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985); *United States v. First Natl. Bank of Circle*, 652 F.2d 882, 886 n.5 (9th Cir. 1981); *Williams v. Howard Johnson's, Inc.*, 323 F.2d 102 (4th Cir. 1963); *but see Manetas v. International Petro. Carriers, Inc.*, 541 F.2d 408, 413 (3d Cir. 1976).

for an extension of time to appeal must be timely. *Pryor v. Marshall*, 711 F.2d 63 (6th Cir. 1983). While awkward, such rules bring certainty to the litigation and, as applied in the context of the *Mitchell* type cases, permit an orderly resolution of the underlying litigation.

We recognize the opportunity for abusive delay inherent in the protections afforded by the doctrines of absolute and qualified immunity, but we believe that it can be minimized by diligent administration of pretrial proceedings in the district court and the effective use of procedures for expediting the resolution of insubstantial appeals in the court of appeals.

The foregoing principles are applicable to this litigation.

II.

The complaint filed in the district court alleged that during the early morning hours of October 27, 1981, plaintiff Robert E. Kennedy, Jr., was proceeding in his automobile along Pearl Road in Cleveland when he was stopped by two Cleveland City police officers for having allegedly failed to obey a red light. It is alleged that during the arrest Officer John Riley later joined by his fellow officer, Raymond Offutt, assaulted Kennedy, and that other officers, who subsequently arrived at the scene, ignored Kennedy's complaints of pain. Upon arriving at the station, Kennedy alleges that he was placed in a jail cell where he was again assaulted and verbally abused by Riley who repeatedly punched and kicked him while Offutt and another officer stood by. Thereafter, Kennedy alleges, he was transported in the custody of Riley and Offutt to Cuyahoga County Metropolitan Hospital for examination and treatment. He alleges that the officers caused him to be handcuffed during most of his hospital stay. He further alleges that during his stay at the hospital he was twice assaulted by officers assigned to guard him. Two other defendants whose identities apparently are unknown are alleged to have threatened Kennedy that his family would be harmed or that his residence would be burned to the ground. Finally,

he maintains that to "cover up their own misconduct" defendants Riley and Offutt in conjunction with others, filed criminal charges against the plaintiff which they knew to be untrue. Kennedy contends that these acts were taken pursuant to a policy, practice and custom of the police department "to summarily punish persons who are stopped or arrested, or refuse to obey unlawful police orders or who refuse to submit to excessive use of force and the denial of necessary medical attention" and that such policies and practices violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1983, 1985, and 1986.

Appellants here are not the officers directly involved in the assault. William Hanton is Chief of Police for the City of Cleveland, and Frank Wszelaki is an officer of the Cleveland Police in the Internal Affairs Division who with one Officer Romph was assigned the responsibility for investigating, conducting interviews of witnesses and collecting evidence with respect to citizen complaints against officers in the department. It is alleged that, contrary to their responsibility, Wszelaki and Romph failed to initiate or recommend disciplinary or criminal action against the police officers who committed misconduct and instead deliberately covered up such activities. In a supplemental complaint it was further alleged that Hanton, Wszelaki and other policy making officials of the City established a policy that makes the discipline and prosecution of police officers for misconduct improbable. The complaint as amended generally alleged that Chief Hanton participated in a policy of tolerating the coverup of misconduct and encouraging misconduct by failing to provide adequate training and supervision of the officers and by failing to promulgate and enforce necessary rules of conduct. All of this, it is alleged, resulted in serious physical harm to plaintiff Robert E. Kennedy. Kennedy's wife, Joyce, sought damages for loss of consortium and companionship and also alleged that because of his injuries she was compelled to care for plaintiff and was deprived of his services.

Hanton and Wszelaki were sued both in their personal and official capacities. Also named in the complaint, as amended, were not only other officers of the department but as well as the City of Cleveland, its mayor, its prosecutor, and the Cleveland Police Department. The complaint sought compensatory and punitive damages, declaratory relief and certain injunctive relief, purportedly to avoid on behalf of the public at large a repetition of the injury allegedly suffered by the plaintiffs through the development of "specific, adequate and clear guidelines in accordance with all rights secured by the constitutions of the State of Ohio and of the United States." The complaint also alleges pendent claims against the defendants under Ohio law.

III.

Appellants Hanton and Wszelaki appeared and answered separately but through the same attorney. Each raised as a special defense that "these defendants acted lawfully, with probable and reasonable cause and in good faith." In addition, Chief Hanton specifically claimed that he was "immune from the damages claims asserted in the complaint."

The civil docket sheets in the district court reflect extensive activity in the case between the January 10, 1983, filing of the answers by appellants and the entry upon the docket on August 27, 1984, of an order of the trial judge scheduling the case for trial on a standby basis for a two week period commencing December 3, 1984, and ordering that "all dispositive motions must be filed with the court by October 15, 1984." Activity in the case is reflected by more than sixteen pages of docket continuation sheets from the date of filing the complaint on October 26, 1982, until August 27, 1984.

Numerous status calls were made by the court and both sides engaged in extensive discovery by way of interrogatories. On November 1, 1984, after receiving permission to file after the deadline for dispositive motions, Wszelaki and Hanton joined by the City of Cleveland and its mayor moved

for summary judgment. The extensively documented statement of reasons appears to have been directed primarily to the absence of any involvement by the individual defendants in the alleged misconduct and in the absence of any evidence, following discovery, that there was a coverup by the Chief or by Officer Wszelaki. Hanton and Wszelaki argued that they therefore were entitled to judgment as a matter of law for the failure of the plaintiffs to produce any evidence of liability or to rebut any evidence of nonliability which had been assembled in the course of discovery or was contained in affidavits attached to the motion. In an extensive opinion and order dated February 12, 1985, the court, having previously granted a motion for continuance of the scheduled December 1983 trial date, granted defense motions to dismiss plaintiff Robert Kennedy's claims brought under 42 U.S.C. §§ 1985 and 1986. The motions for summary judgment were denied as to the City of Cleveland, Hanton and Wszelaki based upon the court's examination of the entire record of the criminal proceedings against Robert Kennedy in the Cleveland Municipal Court[7] and review of the written statements of many of the police officers and of the employees of the hospital, statements taken by Officers Romph and Wszelaki, and affidavits. As to Chief Hanton, the court concluded that "a trier of fact could find, based upon the materials presented, that the defendant Hanton was a party to the conspiracy." With respect to defendant Wszelaki, the trial judge saw the issue as a "consideration of whether evidence exists to support Kennedy's claim that the alleged post-assault cover-up conspiracy had as a goal the *continued* and *unjustified* prosecution of Kennedy as a countermeasure to Kennedy's brutality countercharge against officers of the police department." The court found that a trier of fact could reasonably conclude that "not only did a post-assault cover-up

[7]Kennedy was acquitted on one count of assault and two counts of carrying a concealed weapon. He pled no contest to a charge of disorderly conduct and the remaining charges were dismissed.

conspiracy exist, but that Wszelaki participated in the conspiracy."

After eight days of trial the judge on April 19, 1985, declared a mistrial based upon the court's determination from the evidence presented that the defense of both Chief Hanton and Officer Wszelaki could not be properly conducted by a single counsel in view of a conflict of interest between those two defendants. Following the mistrial, existing counsel continued in his representation of Chief Hanton but Officer Wszelaki thereafter obtained separate counsel and a further continuance of trial until October 7, 1985.

On September 24, 1985, Hanton, without requesting further permission to extend the earlier October 15, 1984, deadline for dispositive motions, filed what he characterized as a "supplemental" motion for summary judgment, raising a claim of qualified immunity and requesting a stay of proceedings under the then recently decided case of *Mitchell v. Forsyth.* This was followed with an addendum in which he also raised a claim of absolute immunity. On October 1, 1985, Wszelaki, now appearing by his own counsel but without obtaining specific permission, filed a motion for reconsideration of his previous motion for summary judgment. That motion also included claims of absolute and qualified immunity.

Following a hearing, the district court, in an opinion dated October 2, 1985, rejected both motions finding no good cause for reconsideration of his February 12, 1985, order denying summary judgment.

It is plain that after the mistrial and before the case was set for a new trial, Hanton and Wszelaki both sought to take advantage of the ruling in *Mitchell v. Forsyth,* which had been forthcoming in the meantime, to seek an early decision on their claims of immunity. Obviously endeavoring to avoid the claim that his earlier motion for summary judgment had invoked the defense but that he had waived objection by fail-

ing to appeal, Hanton claimed that the original November 1, 1984, motion did not raise an immunity claim. The trial judge however struck the supplemental motion concluding that Hanton had on November 1, 1984, sought summary judgment based at least in part on immunity. While it is difficult to read this motion as a claim of immunity it is not impossible and, the trial judge, who had participated in the development of the claims and arguments in this case, so conceived it. Hanton's earlier motion did refer to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), at least in discussing the plaintiffs' failure to satisfy pleading requirements, and although he did not use the word immunity, he seems very clearly to have relied on *Harlow's* protection of qualified immunity, while stressing general absence of a showing of liability in any event. Moreover, counsel for Hanton had in his argument for the supplemental motion acknowledged that,

> Your honor, I don't think that [the supplemental motion presents] any different underlying arguments. I think it is another view of saying the same arguments .... Now I believe the underlying arguments have been made all along, and we're simply clarifying them in the sense of pointing out that the Chief is entitled to qualified as well as absolute immunity on the basis of the arguments that have been made.

In Wszelaki's case it is apparent that the judge had some greater sympathy. In its order of April 24, 1985, declaring a mistrial the court indicated that Wszelaki's testimony supported his reliance upon a defense of qualified immunity. Thus, a part of Wszelaki's defense appeared to be that he was acting under direct orders from his superior when he conducted the investigation. And in his case at the aborted trial counsel had represented that since Wszelaki was expected to pass upon the placing of charges against the officers involved, his role was prosecutorial and hence he was entitled to an absolute immunity. On October 2, Wszelaki's motion for

reconsideration was likewise stricken, the court conceiving that Wszelaki also had previously relied upon the immunity defense. While the trial judge had indicated that for good cause shown he would permit a lifting of the previous cutoff date on discovery and motions, he was not satisfied with the merits of the defense nor did he believe even that it had been timely filed. Granting that *Mitchell* had clarified the existing law with respect to the appealability of pretrial orders denying qualified immunity, the trial judge noted that while *Mitchell* had been decided on June 19, 1985, Wszelaki's counsel had waited until October 1, 1985, to file his motion. He therefore held that the motion was untimely and was without any showing of good cause why its interposition should be delayed until shortly before the scheduled retrial date.

IV.

As we stated earlier, the appealability of orders denying absolute and qualified immunity is governed by the same temporal limitations and subject to the same rules as other appeals, whether interlocutory or final. If Hanton's and Wszelaki's November 1 motion did in fact raise the question of absolute or qualified immunity, the parties had thirty days after the order denying it in which to file a notice of appeal. Having failed in this we conclude that they lost that right, and any later effort to appeal would not be timely. While the supplemental motions might have been construed as motions to alter or amend under Fed. R. Civ. P. 59(e) and, as such, would have extended the period for filing an appeal, these motions were filed well outside the ten-day limitation period of Rule 59(e). *Denley v. American Exp. Inc.*, 733 F.2d 39 (6th Cir. 1984); *Venen v. Sweet*, 758 F.2d 117 (3d Cir. 1985). Since motions for reconsideration must be timely in order to extend the period for appeal, the untimely supplemental motions here cannot have worked such an extension. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978).

Having said this much the question yet remains whether such motions can be renewed after they were earlier denied

and whether their denial can be made the object of a new and independent appeal. Certainly renewal of such motions seems to us to be a matter best left to the sound discretion of the trial judge who is charged with the responsibility for managing his docket and insuring an expeditious processing of the litigation. Where, as here, no new facts or previously unavailable legal arguments were offered and no good cause has been shown to excuse the inordinate delay, it was not an abuse of discretion in our judgment for the trial judge to have denied the motions. *See In re Walton Hotel Co.*, 116 F.2d 110, 112 (7th Cir. 1940).

We realize that the action of the trial judge in striking the renewed motions rather than merely denying them, is counter to the holding in *Sydney-Vinstein v. A. H. Robins Co.*, 697 F.2d 880 (9th Cir. 1983). *Sydney-Vinstein* held that it is normally error for a district court acting under Fed. R. Civ. P. 12(f) to strike a Rule 59(e) motion for reconsideration rather than simply denying it. The basis for the Ninth Circuit holding that this was error was that the court was permitted to strike pleadings only for "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," *id.* at 885, and that the general use of Rule 12(f) as a means of not addressing the motion is not to be approved.

> An order striking a motion to reconsider is necessarily a post judgment decision. Since the function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial, striking a motion to reconsider fails to comply with the policies underlying F.R.Civ.P. 12(f).

Id. at 885.

Here, while technically in the form of a striking of the pleading, the order was plainly a denial of the motion and our standard for review, whether the trial judge abused his or her discretion, remains the same. The argument made in

Sydney-Vinstein that, because motions to strike in effect "delete from the record both the motion to reconsider and all supporting briefs and evidentiary exhibits," improper employment of Rule 12(f) "would shield erroneous district court orders from review," *id.* at 885, is not altogether satisfying. The right exists in any event to make an adequate separate record in much the same way that striking of other pleadings and evidence may still be accompanied by preservation of the same for the purposes of appeal. While we agree that the better practice would have been to have directly denied the motions as untimely without striking them, we view the error, if any at all, as harmless.

V.

As noted earlier, the Kennedys have sought not only personal liability and damages but also have brought suit against the defendants in their official capacities, and in addition to damages have requested injunctive relief.[8] At least one circuit has held that under such circumstances the denial of a claim of immunity is not immediately appealable when it appears that the defendant in question will remain a party of the suit for injunctive relief purposes. *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir.), *cert. denied*, 469 U.S. __, 105 S. Ct. 349 (1984). The Fourth Circuit reasoned that since the purpose of the interlocutory appeal was to permit a party to obtain an early termination of the litigation as to him so that the party in question could continue on in his performace of his duty, the achievement of that purpose fails when that same party must in all events continue in the lawsuit. *Bever* noted that qualified immunity was not designed to operate as a complete bar to claims against public officials but rather to pro-

[8]The Supreme Court in *Mitchell* declined the decide whether a district court's denial of summary judgment predicated on a claim of qualified immunity is immediately appealable when the moving defendant would remain in the litigation in his official capacity. *Mitchell*, 105 S. Ct. at 2812 n.5.

vide an avenue for expeditious termination of litigation and protection against claims of non-constitutional wrongs. The court concluded that under the circumstances, with the trial and prospect of prompt vindication close at hand, the denial of immunity claims would have little deterrent effect on "the willingness of responsible persons to serve in public office." *Id.* at 1087.

We decline to follow the Fourth Circuit rule here. Although it plainly would have eased our task on review by offering a very quick answer to the problems of appealability, the reasoning does not remain persuasive in our view in light of the Supreme Court's later holding and rationale in *Mitchell.* The exposure to personal liability in damages and the potential need for retention of private counsel to protect against that risk is quite different from the problem faced by an official who is charged only in an official capacity. The dilemma arising from the dual capacity in which a defendant is sued is particularly evident here where in fact it caused a mistrial. We believe that the rationale of *Mitchell v. Forsyth* should apply equally whether only personal liability for damages is sought or whether added relief against the defendant in his official capacity is also sought.

Finally we make clear, as does *Mitchell,* that our decision here, as well as the trial judge's, decides no more than whether the defendants must go to trial. It is not intended to preclude the interposition of the defense of qualified or absolute immunity as a defense on the merits itself. *See Mitchell v. Forsyth,* 105 S. Ct. at 2816.

AFFIRMED.

FILED
AUG 27 1986
JOHN P. HEHMAN, Clerk

No. 85-3819/3827

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT E. KENNEDY, JR.;
JOYCE KENNEDY,

Plaintiffs-Appellees,

O R D E R

v.

CITY OF CLEVELAND, ET AL.,

Defendants,

WILLIAM T. HANTON (85-3819),
FRANK WSZELAKI (85-3827),

Defendants-Appellants.

Before: ENGEL, KEITH and MILBURN,
Circuit Judges.

Appellant Hanton having filed a petition for rehearing with this court, and this court having considered said petition and not being persuaded that we erred in the original disposition,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM T. BARTON,

Petitioner

v.

ROBERT E. KENNEDY, JR., et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED

1. Whether or not the Supreme Court of the United States lacks jurisdiction to entertain a petition for a writ of certiorari when the petitioner failed to file a notice of appeal to the Court of Appeals within thirty days of the District Court's ruling.

2. Whether or not this Court should review the decision of the lower court when the District Court had denied a motion to reconsider for lack of good cause where Petitioner had submitted no evidence or arguments to justify reconsideration.

3. Whether or not a District Court has the authority to set temporal deadlines for the filing of dispositive motions.

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STATEMENT OF THE CASE

A. Factual Background

During the early morning hours of October 27, 1981, Respondent, Robert E. Kennedy, Jr., was proceeding in his automobile along Pearl Road in Cleveland when he was stopped by two City of Cleveland police officers for having allegedly failed to obey a red light. During the arrest, officers John Riley and Raymond Offutt assaulted Kennedy. Other officers who subsequently arrived at the scene ignored Kennedy's complaints of pain. Upon arriving at the station, Kennedy was placed in a jail cell where he was again assaulted and verbally abused by Riley who repeatedly punched and kicked him while officer Offutt and another officer stood by. Thereafter, Kennedy was transported in the custody of Riley and Offutt to Cuyahoga County Metropolitan Hospital for examination and treatment. The officers caused him to be handcuffed during most of the hospital stay. During his stay at the hospital, Kennedy was twice assaulted by other police officers assigned to guard him, although he had done nothing to provoke the assaults.

Several hospital employees witnessed the beatings at the hospital. One beating occurred when Kennedy was handcuffed to a wheelchair while being transported from the X-ray department. The other beating occurred in an examination room. Each and every hospital employee indicated in their statements to the police that Kennedy did nothing to provoke the violence. Instead, he mostly cried and begged the officers to stop. Most of the hospital employees observed evidence indicating that at least two of the officers involved were intoxicated.

Two other officers, whose identities are unknown, threatened Kennedy, while at the hospital, that his family would be harmed or that his residence would be burned to the ground. Following Kennedy's release from custody, he went into a deep coma and was

hospitalized for eleven days as a result of the beatings. He continued to suffer headaches and other post-concussive symptoms. He lost his job and incurred extensive medical expenses. Kennedy's wife filed a complaint of police brutality with the Police Department asserting that her husband had been seriously injured as a result of police misconduct.

A post-assault cover-up conspiracy involving Petitioner Hanton and other police officials then ensued. Kennedy was charged with and prosecuted for a series of offenses including a traffic light violation, two assaults, resisting arrest, and possession of a concealed weapon, (a pocket knife used in his work).

The case was eventually assigned for investigation to Petitioner Hanton's special investigation unit, the Professional Conduct and Internal Review Unit (PCIR). PCIR concluded, in a seriously flawed investigation, that there was no police misconduct whatsoever.[1] This investigation was designed to cover up the truth of what actually occurred.

Petitioner Hanton, as Chief of Police, reviewed the Kennedy investigation conducted by PCIR and concluded that the police acted properly. He confirmed the conclusion that police procedures had not been violated.

Subsequently, a lengthy jury trial was conducted in Cleveland Municipal Court on the criminal charges brought against Kennedy. Although Respondent had requested discovery pursuant to the Ohio Rules of Criminal Procedure, he received none of the statements of the hospital witnesses that had been obtained by the police.

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1 As the District Court noted, PCIR investigator Wszelaki's testimony with respect to his internal investigation of the alleged beating of Kennedy at the hospital, was that the written statements of the challenged police officers were as a matter of policy taken to be truthful and worthy of belief in the face of contradictory evidence by civilian witnesses - even though the police officers refused to consent to face-to-face interviews. This was so despite the fact that the civilian witnesses, who offered testimony to the effect that Kennedy was beaten while handcuffed and seated in a wheel chair being escorted by hospital personnel, were questioned extensively in face-to-face interviews by Wszelaki who employed the "question and answer" method.

These statements had contradicted the police officers' testimony. At the close of the City's case, the presiding trial judge, upon motion of Kennedy, entered acquittals on the two assault charges and the charge of carrying a concealed weapon. Thereafter, in return for the Petitioner's no contest plea to the uncharged minor misdemeanor of disorderly conduct, the remaining charges were dismissed by the prosecution.

Respondents alleged in their complaint, inter alia, that Petitioner Hanton and other policy-making officials of the City established a policy making the discipline and prosecution of police officers for misconduct improbable. Respondents' complaint also alleged that Petitioner Hanton participated in the Kennedy cover-up and in a policy of tolerating the cover up of misconduct and encouraging misconduct by failing to provide adequate training and supervision of the officers and by failing to promulgate and enforce necessary rules of conduct. All of this resulted in serious physical harm to Respondent Robert Kennedy. Kennedy's wife, Joyce, sought damages for loss of consortium and companionship and also alleged that because of his injuries, she was compelled to care for her husband and was deprived of his services. Respondents contend that such policies, practices, and conduct violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and 42 USC Secs. 1983, 1985 and 1986. Petitioner Hanton was sued in both his personal and official capacities.

B. Procedural Background

Petitioner Hanton appeared and answered. He raised, as a special defense, the claim that he "acted lawfully, with probable and reasonable cause, and in good faith." In addition, Chief Hanton specifically claimed that he was "immune from the damages claims asserted in the complaint."

The civil docket sheets in the district court reflect exten-

sive activity in the case between the January 10, 1983 filing of the answers and the entry upon the docket on August 27, 1984. That entry of the trial judge scheduled the case for trial on a standby basis for a two week period commencing December 3, 1984, and ordered that "all dispositive motions must be filed with the Court by October 15, 1984." Activity in the case is reflected by more than sixteen pages of docket continuation sheets from the date of filing the complaint on October 26, 1982 until August 27, 1984. A great deal of additional activity has transpired since August of 1984.

Numerous status calls were made by the court and both sides engaged in discovery by way of interrogatories, depositions and document requests. On November 1, 1984, after receiving permission to file beyond the deadline for dispositive motions, Petitioner Hanton, joined by several other defendants, moved for summary judgment. Hanton's statement of reasons was directed primarily to the alleged absence of any involvement by the individual defendants in the alleged misconduct and in the alleged absence of any evidence, following discovery, that there was a cover up by the Chief and others. Petitioner argued that he was, therefore, entitled to judgment as a matter of law for the failure of Respondents to produce any evidence of liability or to rebut any evidence of non-liability which had allegedly been assembled in the course of discovery or was contained in affidavits attached to the motion.

In an extensive opinion and order dated February 12, 1985, the District Court, having previously granted a motion for continuance of the scheduled December 1984 trial date, granted defense motions to dismiss Respondent Robert Kennedy's claims brought under 42 USC Sec.s 1985 and 1986. However, the motions for summary judgment were denied as to Hanton and others based upon the court's examination of the affidavits submitted, the entire record of the criminal proceedings against Kennedy in the

Cleveland Municipal Court, which had been filed and review of the written statements of many of the police officers and of the hospital employees and other documents. As to Chief Hanton, the District Court concluded that summary judgment was not warranted for at least two reasons:

1) The trier of fact could find, with respect to Respondent Kennedy's claims growing out of the assaults, that Petitioner Hanton's failure with respect to training and disciplining had a causal relationship to Kennedy's injuries; and,

2) The trier of fact could find, with respect to the post-assault cover up, that Petitioner Hanton was a party to the conspiracy. (See Petitioner's Petition, Appendix, A-19 to 20.)

After the denial of summary judgment, trial commenced in April of 1985. After eight days of trial, the District Judge on April 19, 1985, declared a mistrial based upon the court's determination from the evidence presented that the defense of both the City and Sergeant Wszelaki of the PCIR could not be properly conducted by a single counsel, actually Petitioner's counsel herein, in view of a conflict of interest between those two defendants. Following the mistrial, Petitioner's existing counsel continued in his representation of Chief Hanton and the City, but Officer Wszelaki thereafter obtained separate counsel and a further continuance of trial until October 7, 1985. The District Court set aside several weeks for the trial.

On September 24, 1985, Petitioner Hanton, without requesting further permission to extend the earlier November 1, 1984 deadline for dispositive motions, filed what he characterized as a "supplemental" motion for summary judgment, seeking to raise a claim of qualified immunity and requesting a stay of proceedings under the then recently decided case of Mitchell v Forsyth, ___ US ___, 105 S.Ct 2806 (1985). This was followed by an addendum in which he also sought to raise a claim of absolute immunity.

Following a hearing, the district court, in an opinion dated October 2, 1985, rejected Petitioner's motions finding no good

cause for reconsideration of the February 12, 1985 order denying summary judgment.[2] Petitioner Hanton and Defendant Wszelaki then pursued an appeal to the Sixth Circuit Court of Appeals. As part of that appeal, they obtained an interim stay which prevented the trial from going forward on October 7, 1985.

The Court of Appeals for the Sixth Circuit fully considered the issues raised before it by Petitioner (and Defendant Wszelaki). On July 30, 1986, the Court of Appeals issued a lengthy and detailed opinion affirming the District Court's orders and rejecting all of Petitioner's arguments. Petitioner subsequently filed a Petition for Re-Hearing. On August 27, 1986, that petition was turned down. On November 25, 1986, Petitioner Hanton filed a Petition for Writ of Certiorari,[3] thus bringing the matter before this Court for its consideration.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to consider this case because, as the Sixth Circuit Court of Appeals ruled, Petitioner Hanton did not file a timely notice of appeal from the District Court ruling. Further, the issues Petitioner now raises are being raised for the first time in this Court.

The Sixth Circuit decision in this case does not conflict with the decision of any other circuit, nor does it conflict with any decision of this Court.

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2 The District Court technically ruled that Petitioner's motion was stricken from the record. The Court's reason for this ruling was that it found "no good cause shown for it to reconsider its February 12, 1985 order denying Hanton's motion for summary judgment..." (Petitioner's Petition, Appendix A-49) The Court of Appeals held that the District Court technically should have denied the motion rather than strike it from the record, but it treated the ruling as a denial and applied the same standards of review as if it were an outright denial.

3 Defendant Wszelaki, who had been the only other appellant in the most recent appeal to the Sixth Circuit, did not choose to seek certiorari.

Petitioner's underlying premise is not supported by the record. The District Court did not bar submission of Petitioner's eve of trial motions to reconsider because they were submitted beyond a previously set deadline. Rather, the Court considered and denied the motions because, as Petitioner's counsel admitted at the hearing, the motions raised no new facts or arguments. The Court, therefore, found that Petitioner failed to show good cause for it to reconsider its prior rulings.

Petitioner was made aware of Respondents' allegations concerning the deprivation of his rights under Brady v Maryland, 383 US 83 (1963) at least a year and a half before the District Court denied his summary judgment motion. Moreover, the Brady allegations were not the basis upon which the District Court denied summary judgment against Petitioner Hanton.

District Courts have authority to impose temporal deadlines for the filing of dispositive motions.

This case is not ripe for review because Petitioner Hanton will remain as a defendant in the trial even if this Court renders a ruling in his favor.

ARGUMENT: REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THIS COURT LACKS JURISDICTION TO CONSIDER THIS CASE

A. Petitioner's Appeal to the Sixth Circuit Was Not Timely

Petitioner filed a Motion for Summary Judgment on November 1, 1984. The motion was denied on February 12, 1985. Petitioner filed his notice of appeal on October 3, 1985, more than 190 days after the order had issued.

Rule 4 of Federal Rules of Appellate Procedure requires that an appeal be filed within thirty days of the issuance of the order appealed. The Court of Appeals ruled that the petitioner

lost his right to appeal 30 days after February 12, 1985.

Further, the Court of Appeals ruled that Petitioner did not extend the time within which to appeal by filing his flurry of supplemental motions in September and October, 1985. These motions qualified neither as motions to "alter or amend" pursuant to Rule 59(e), Federal Rules of Civil Procedure which would have required filing within ten days, nor as motions for reconsideration.[4] Therefore, this Court is without jurisdiction to consider this petition.

It has long been held that a reviewing Court lacks jurisdiction to hear an appeal unless it is timely taken. Berman v United States, 378 US 530 (1964); United States v Robinson, 361 US 220 (1960). Timely notice is "mandatory and jurisdictional". Browder v Director, Dept. of Corrections of Illinois, 434 US 257 (1978). As stated in Williams v Treen, 671 F.2d 892, 895 (5th Cir., 1982):

> Rule 4(a) of the Federal Rules of Appellate Procedure provides that notice of appeal shall be filed with the clerk of the district Court within 30 days after the date of entry of the judgment or order appealed from. This Court has consistently held that compliance with Rule 4(a) is a mandatory precondition to the existence of jurisdiction by the Appellate Courts. (citations omitted, emphasis added)

B. Petitioner Failed to Raise the Issues in the Lower Courts

These issues are not now appropriate for review because they were not raised or resolved in the lower Court. The general rule enunciated by this Court is that it should not decide issues that were not raised nor resolved in the lower court. Youakim v Miller, 425 U.S. 231, 234 (1976); California v Taylor, 353 U.S. 553, 557, n. 2 (1957). It is only in exceptional circumstances, not present herein, where this Court would review such questions. Duignana v United States, 274 U.S. 195, 200 (1927).

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4 As the Court of Appeals noted, Petitioner was obviously attempting to take advantage of the potential right to interlocutory appeal as provided by Mitchell v Forsyth, supra, and to avoid the claim that his appeal would be untimely.

The issues raised in the Petition were not issues in the Courts below, and were neither briefed nor argued. In fact, these issues are being squarely presented for the first time in the Petition for a Writ of Certiorari. Respondent submits that this Court should decline to review these questions which the parties herein would be arguing for the first time in this, the Court of last resort.

II. REVIEW OF THIS CASE IS NOT JUSTIFIED PURSUANT TO RULE 17.1 OF THE SUPREME COURT RULES

A. The Decision Appealed from Does Not Conflict With Decisions of Other Federal Court of Appeals.

Petitioner contends that the decision appealed from conflicts with the case of Manetas v International Petroleum Carriers, Inc., 541 F.2d 408 (3d Cir. 1976), and that this forms a basis for review pursuant to Rule 17.1 (a) of the Supreme Court Rules. Respondent submits, however, that such a conflict within the Circuits does not exist to the extent that would make review by this Court appropriate.

1. Manetas is Not Good Law

Manetas, supra, stands alone for the proposition presented by Petitioner. As noted by the Sixth Circuit in its opinion, there is ample and more recent authority in the circuits which support a District Court's power to control its docket not withstanding the "any time" language of Rule 56, Federal Rules of Civil Procedure, particularly with respect to dealing with disruptive motions filed on the eve of trial. See Management Inv. v UMW, 610 F.2d 384, 389 (6th Cir. 1979); Eagle v American Tel. & Tel. Co., 769 F.2d 541, 548 (9th Cir., 1985); U.S. Dominator v Factory Ship Robert E. Resoff, 768 F.2d 1099, 1104 (9th Cir. 1985); United States V First Nat'l Bank of Circle, 652 F.2d 882,

886 n. 5 (9th Cir. 1981); Williams v Howard Johnson's Inc., 323 F.2d 102 (4th Cir. 1963). It is worthy to note, as well, that although it is a ten year old opinion Manetas, supra, has not been cited by any Court, including subsequent Third Circuit decisions[5], for the proposition for which it is cited by Petitioner

2. "Manetas" is Distinguishable

In Manetas, supra, the District Court considered and ruled upon a defendant's summary judgment motion even though it was filed beyond a 45-day time limitation contained in a pre-trial order. The Court itself decided to rule upon the otherwise tardy summary judgment motion and, therefore, in effect, modified the time limitation of its pre-trial order. Further, the Manetas Court was not confronted with a disruptive motion filed on the eve of trial. When reviewing the case, the Third Circuit merely confirmed that the District Court had the authority to consider the motion.

In the instant case, the District Court also set a time limitation for the filing of dispositive motions. Petitioner filed his motion for summary judgment within that time limitation of November 1, 1984, and the motion was fully considered and denied. However, eight months after the denial and only 14 days before the re-trial was to begin, Petitioner filed a "Supplemental Motion for Summary Judgment". That supplemental motion, which is the subject of the Petition, was denied by the District Court which held that the Petitioner showed no good cause for it to reconsider it previous denial. The Court of Appeals affirmed for that reason and also noted that a District Court had the authority to set reasonable time limitations for the filing of dispositive motions.

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5 See In Re Paper Antitrust Litigation, 685 F.2d 810 (3rd Cir., 1982)

It is important to note, as well, that the Manetas Court did not have to consider the time delays and disruptiveness which confronted the District Court in the instant case, where there have been more than 450 separate docket entries, numerous motions filed for reconsideration by Petitioner's counsel and an aborted eight day jury trial caused by the conflict of interest presented by Petitioner's counsel. In addition, the Manetas motion was the first motion for summary judgment filed by the defendants, while the motion presented here for review was a Supplemental "rehash" of one previously denied.

The rationale for granting certiorari with respect to a conflict among the Circuits is to maintain uniformity in the application of federal law. Any possible conflict presented by these two cases is, at most, insignificant and not worthy of review in light of the unique factual situations here and the unlikelihood of future recurrence.[6]

3. Resolution of Any Alleged Conflict is Irrelevant to the Outcome of this Case

Finally, any resolution of the alleged "conflict" cited by Petitioner will be irrelevant to the actual outcome of this case. As noted above, the District Court denied the motion because it found no good cause to reconsider its previous ruling. The Sixth Circuit affirmed the denial for the following reasons:

1) Petitioner lost his right to appeal when he failed to file a notice of appeal within thirty days of the original order denying his first motion;

2) Petitioner's subsequent motions failed to extend the time to appeal because they were not timely filed within the ten-day period prescribed by Rule 59(e), Federal Rules of Civil Procedure; and

3) The District Court did not abuse its discretion in denying Petitioner's motion, even if viewed as a renewal of his previously denied motion for summary judgment, since Petitioner failed to submit any new facts, previously unavailable legal arguments, or good cause to excuse his delay.

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6 See Harlan, Manning the Dikes (1958), 13 Record NYC BA 541, 552.

4) It would be proper for the District Court to establish a time for filing motions challenging the sufficiency of the pleadings.

The issue raised in the Petition deals only with the last of these reasons. Where the resolution of a conflict, even if otherwise "clear", is irrelevant to the final outcome of the case, this Court should decline review. Sommerville v United States, 376 U.S. 909 (1964).

B. The Decision of the Court of Appeals Below Does Not Conflict with Mitchell

Petitioner asserts in his Jurisdictional Statement that certiorari ought to be granted on the basis of Rule 17.1 (c) of the Supreme Court Rules because the United States Court of Appeals for the Sixth Circuit has decided a federal question in a way which is in conflict with Mitchell v Forsyth, supra, (See p. 3 of the Petition). Petitioner never clearly articulates the basis for this assertion other than to state, in conclusory fashion, that "the acceptance of the District Court's rationale for refusing to consider the merits of Petitioner's claim of qualified immunity effectively deprived him of the right to the pretrial ruling and interlocutory appeal mandated by Mitchell v. Forsyth, supra."[7] (See p. 16 of the Petition.)

Respondent submits that the Sixth Circuit's decision in no way conflicts with Mitchell. In fact, it clearly and carefully follows its teachings. The Sixth Circuit merely reasoned that in order to perfect any right to appeal, including that deriving from Mitchell, the appellant must file a notice of appeal within thirty (30) days of the date of the decision appealed from. [See

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7 It must be noted that Petitioner has certainly taken full advantage of any right to an interlocutory appeal which Mitchell affords him. He filed an appeal, obtained a stay of the trial (at this point a 16 month delay) and received a thorough, albeit unfavorable, consideration of his appeal by the Sixth Circuit. Perhaps, Petitioner believes that Mitchell requires that all defendants appealing on an interlocutory basis are entitled to a favorable resolution of their appeal. Mitchell obviously does not stretch nearly that far.

e.g. Rule 4(a), Federal Rules of Appellate Procedure; Moorer v Griffin, 575 F.2d 87, 89 (6th Cir., 1978).]

Mitchell extends the right to seek an interlocutory appeal to circumstances wherein a summary judgment motion based upon grounds of qualified immunity has been denied. Nothing in Mitchell even remotely suggests that such an appeal is somehow not subject to the same time requirements that are applicable to all other appeals. The Court of Appeals simply applied the standard time requirements to this appeal. This conclusion in no way conflicts with Mitchell.

III. THE DISTRICT COURT DID NOT BAR SUBMISSION OF PETITIONER'S MOTIONS ON THE GROUND THAT THEY WERE SUBMITTED BEYOND A PREVIOUSLY SET DEADLINE, BUT INSTEAD FOUND NO GOOD CAUSE TO RECONSIDER ITS PRIOR ORDER DENYING SUMMARY JUDGMENT.

Petitioner premises his entire argument upon the inaccurate assertion that the District barred submission of his eve of trial motions because they were submitted beyond a previously set deadline. Review of the District Court's opinion reveals that, in fact, the District Court considered and denied Petitioner's renewal motion simply because he failed to show good cause, in the form of additional evidence or arguments, for the Court to reconsider its prior orders. (See Petitioner's Appendix, A-49) In fact, at the hearing on Petitioner's renewal motion, Petitioner's counsel admitted this fact:

> THE COURT: Don't you, in essence, reargue the same grounds that were in your motions of November 1st by new case citations?
>
> MR. BERGER: Your Honor, I don't think that they (sic) are actually any different underlying arguments. I think it's another view of saying the same argument..

Both the District Court and the Sixth Circuit relied on these admissions in reaching their decision. The Sixth Circuit, in

considering this issue, stated as follows:

> Certainly renewal of such motions seems to us to be a matter best left to the sound discretion of the trial judge who is charged with the responsibility for managing his docket and insuring an expeditions processing of the litigation, whereas here no new facts or previously unavailable legal arguments were offered and no good cause has been shown to excuse the inordinate delay, it was not an abuse of discretion in our judgment for the trial judge to have denied the motions (See Petitioner's Supplemental Appendix, A-13.)

Petitioner's underlying premise is, therefore, not supported by the record.

IV. THE PREMISE OF PETITIONER'S SECOND QUESTION PRESENTED FOR REVIEW THAT HANTON'S SUMMARY JUDGMENT MOTION WAS DENIED ON THE BASIS OF RESPONDENTS' "BRADY" ALLEGATIONS IS AN INACCURATE REFLECTION OF THE RECORD.

Petitioner Hanton's premise that he could not timely file a summary judgment motion because he was unaware of his alleged immunity defense until the District Court articulated the Brady issue in its February 12, 1985 order is inaccurate.[8] Careful scrutiny of that order reveals that the District Court never even discussed the Brady[9] issue when it resolved the pending summary judgment motion as it applied to Petitioner.

Instead, the District Court articulated two separate grounds which it found to be sufficient to overcome summary judgment with

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8 Petitioner asserts he was not made aware of the Brady allegations until the District Court denied summary judgment on February 12, 1985. This assertion is demonstrably incorrect. The Brady allegations were previously discussed by Respondents as early as June 14, 1983, a year and a half before the District Court denied summary judgment in Plaintiffs' "Brief in Opposition to Motion of Defendants Joyce, Romph, and Wszelaki to Dismiss the claims Against them by Robert Kennedy" (at p.13). It was also discussed in even greater detail in "Plaintiffs' Consolidated Brief and Evidence in Response to Motions for Summary Judgment of Defendants' City of Cleveland, George Voinovich, William T. Hanton, and Frank Wszelaki; and of Defendant Mark Romph; and of Defendant Richard Brinzda" (at pp 69-70). In fact the District Court noted when it denied summary judgment that the defendants, including Petitioner, "scoff(ed) at the notion that the statements obtained by the Wszelaki-Romph investigation constitute(d) Brady material." (See Petition, Appendix, A-26)

9 Brady v Maryland, 383 US 83 (1963).

respect to Hanton:

1) The jury could find that "Hanton's alleged failures with respect to training and discipline had a causal connection to Kennedy's injuries suffered as a result of the alleged beatings" (of Kennedy); and

2) The jury could find that Hanton was a party to a post assault conspiracy designed to cover up the truth of the assaults. (See District Court's Opinion reproduced in Petitioner's Petition, Appendix A-20)10

Nowhere does the District Court analyze the Brady issue in the context of resolving Petitioner Hanton's summary judgment motion. The Brady issue is only discussed in the context of resolving the summary judgment motion of another defendant, Frank Wszelaki.[11] The resolution of that summary judgment motion is simply not before this Court since only Petitioner Hanton chose to file a Petition for Writ of Certiorari. Petitioner's arguments with regard to the Brady allegations are, thus, thoroughly irrelevant to the pending petition and no way warrant review by this Court.

V. THE SIXTH CIRCUIT WAS CORRECT IN STATING THAT DISTRICT COURTS HAVE THE AUTHORITY TO SET TEMPORAL DEADLINES FOR THE FILING OF DISPOSITIVE MOTIONS.

In the instant case, Petitioner contends that a District Court can never impose filing deadlines for summary judgment motions because Rule 56, Federal Rules of Civil Procedure, provides that such motions may be filed "at any time." As noted, supra, Petitioner's motions were not denied by the District Court

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10 It is instructive that Petitioner clearly recognized these two grounds to be the only basis for the District Court's denial of summary judgment against him in his "Application for Clarification of February 12, 1985 Order". There was absolutely no mention of the Brady allegations at all in the Application for Clarification insofar as they related to the claims against Petitioner Hanton. Yet, the Petition for Certiorari is based on the inaccurate assertion that the District Court denied summary judgment against Petitioner Hanton due to its view of the Brady issue.

11 Perhaps, counsel for Petitioner is confused because he also represented Defendant Wszelaki. However, after a conflict of interest became apparent in the midst of trial a mistrial was declared and , Wszelaki chose to obtain separate counsel.

for that reason. Nonetheless, Respondents submit that a district court does have the authority to set reasonable time limitations for the submission of summary judgment motions filed on the eve of trial although Rule 56(b) states that a defendant may move for summary judgment "at any time." The Sixth Circuit so held. Respondents turn now to a discussion of a District Court's authority in that context.

A. A District Court Has the Inherent Right to Control Its Own Docket.

Federal district courts have the inherent right to control their own dockets (including the right to set motion deadlines) in order to facilitate the administration of justice, provided such control is not exercised in an arbitrary or capricious manner. As the Third Circuit Court of Appeals said in In Re: Paper Antitrust Litigation, 685 F.2d 810, 817,(3rd Cir. 1982)

> Matters of docket control and conduct of discovery are committed to the sound discretion of the district court... We will not interfere with a trial court's control of the docket except upon the clearest showing the procedures have resulted in actual and substantial prejudice to the complaining litigant. (citations omitted)

This Court has recently upheld the inherent right of federal courts to enact procedural rules to govern the management of litigation based upon sound considerations of judicial economy. See Thomas v Arn, __US__, 106 S.Ct.466 (1986).

B. Rule 16 of Federal Rules of Civil Procedure Gives Explicit Authority to District Courts to Issue Pretrial Orders That Include Filing Deadlines.

Rule 16 of the Federal Rules of Civil Procedure allows a district court to issue pretrial orders which control discovery, set filing deadlines, limit the issues and, in general, control the subsequent course of the case. The purpose of such orders is to secure the just, speedy and inexpensive determination of cases. Courts have uniformly required that such orders be honored and strictly enforced, to the point of excluding contentions and

evidence not covered by such orders, unless modified. See 3 Moore's Federal Practice, 16.19 pp. 16-42 to 16-46. 6 Wright & Miller, Federal Practice and Procedure, 5152.7 pp. 605-07. United States v First National Bank of Circle, 652 F.2d 882 (9th Cir., 1981); Eagle v AT&T, 769 F.2d 541 (9th Cir., 1982).

In the instant case, the District Judge issued a pretrial order covering a wide range of issues, including a filing deadline for dispositive motions. Petitioner Manton never sought leave of court requesting modification of the order, nor was good cause ever shown to modify the deadline. The order was, in fact, never modified. The Sixth Circuit was correct in noting that District Courts have that authority.

C. Motions for Summary Judgment Filed on the Eve of Trial, With No Opportunity for Opposing Party to Respond, Are Properly Denied.

Rule 56(c) of the Federal Rules of Civil Procedure provides that motions for summary judgment must be served on the opposing party ten (10) days before the time fixed for the hearing in order to give the opposing party the opportunity to respond to the motion. This ten (10) day advance notice provision has been strictly enforced by the courts to the point of denying otherwise warranted motions filed on the eve of trial with no opportunity for the opposing party to respond. Winbourne v Eastern Air Lines, Inc., 632 F.2d 219 (4th Cir., 1980).

Where, as here, the motions are filed on the eve of trial, the non-moving party is deprived of any opportunity to fully respond and the Court is deprived of any opportunity for full consideration of the motions. The only available option left to the Court under those circumstances would be to postpone the trial. This scenario would likely lead to a serious erosion of judicial economy.

D. The Unique Nature of the Rights Granted in "Mitchell" Require Filing Deadlines in Order to Prevent Abuse of the Appeal Process and to Promote Judicial Economy.

This Court has held that public officials may be entitled to immunity (either qualified or absolute) both from liability and trial in certain situations, and that part of the right to immunity includes the right to immediately appeal adverse rulings on summary judgment which involve immunity claims. Such appeals obviously can create havoc with a court's docket and cause inconvenience and delay in the proceedings. Further, precious judicial resources can be wasted by scheduling and preparing for trial only to be thwarted by a last minute interlocutory appeal.

In order to protect the rights granted in Mitchell while at the same time promoting judicial economy and preventing abuse of the appeal process, it is necessary for district courts to set filing deadlines for motions. These must be set far enough in advance of trial so that an appeal can be taken in an orderly fashion prior to the commitment of judicial resources. As the Sixth Circuit held:

> The quid pro quo is obvious: in exchange for the defendant's right to interrupt the judicial process, the court may expect a reasonable modicum of diligence in the exercise of that right.

The case at bar is a good example of the potential for abuse of the appeal process and the reason why the setting of deadlines is important in protecting the rights granted under Mitchell.

VI. CERTIORARI IS NOT WARRANTED IN THIS CASE BECAUSE PETITIONER CANNOT AVOID TRIAL BY VIRTUE OF HIS DEFECTIVE SUMMARY JUDGMENT MOTIONS.

This case is not ripe for review by this Court because even a favorable ruling on the issues presented would not permit Petitioner to avoid standing trial.

A. At Best, Petitioner Has Sought to Raise a Qualified Immunity Defense to Only One of Respondents' Many Claims Against Him.

Petitioner would have this Court believe that there is only one claim against him, namely the deprivation of Respondent's "Brady rights." In reality, there are many other significant claims asserted against Petitioner for which he does not even assert a qualified immunity defense and/or for which none is available including:

- Failure to properly manage the police department, promulgate and institute rules and regulations governing the conduct of police officers and the investigation of police misconduct;

- Failure to properly supervise, train, discipline and control the behavior of the police officers, thereby creating an attitude of complacency within the police force with regard to misconduct and brutality, and permitting officers to commit misconduct to remain in a position to do so;

- Ratification and acquiescence to the misconduct of police officers, including those in the instant case;

- Cover up of police misconduct;

- Conflict of interest and participation in the defenses and indemnity of the police officers, city, and city officials, in the prosecution of the victims of police officers, and in the investigation of police misconduct, all of which leads to a manipulation and cover-up of police misconduct resulting in complacency among the officers. 12

Petitioner would have this Court believe that a favorable ruling on the issue of immunity would effectively dismiss him from the case. Given all the other claims against him, Petitioner will remain a defendant in this case notwithstanding a favorable ruling on the issue of immunity.

B. Petitioner Submitted no Qualified Immunity Claim in Defense of the "Brady" Allegations, Nor Could He Have Done So Since "Brady" Has Been Clearly Established Law Since 1963.

The current test for determining whether or not a defendant

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12 This list is not meant to be exhaustive; see Complaint and Amended Complaint.

who is entitled to raise a claim of qualified immunity [13], has successfully proven that defense was enunciated by this Court in Harlow v Fitzgerald, 457 US 800 (1982):

> ... Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (citations omitted) Id, at 818.

On the other hand:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct... Id, at 818. (emphasis added)

Review of Petitioner's summary judgment motions and attached documents reveals that Petitioner did not argue that the laws that he was alleged to have violated were not clearly established. He did not argue that recent court decisions have modified the law from what it was when the acts and omissions complained of occurred. He made no such claim whatsoever in the affidavits attached to his November, 1984 summary judgment motions or the briefs accompanying them. He never asserted that he did not objectively know of the Constitution's requirement to turn over potentially exculpatory evidence. Of course, this would be a rather difficult assertion to make since Brady made that requirement clearly established law as of 1963.

Instead, the issues presented by Petitioner in defense of the claims against him, though categorized by Petitioner under the rubric of qualified immunity, were not really immunity defenses.

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13 Although Petitioner now claims entitlement to a defense of qualified immunity which would require that he have official discretion and that he acted within the scope of that discretion, [Williams v Treen, 671 F.2d 892, 896-7, (5th Cir., 1982)] he previously claimed that there was no evidence that he was a "decision maker for the City of Cleveland in any relevant respect." (p. 16 of Defendants' Reply Brief in Support of Motion for Reconsideration). Of course, he cannot have it both ways.

He raised factual questions as to causation and as to whether he participated in the conduct that gave rise to Respondents' damages. He premised his assertions upon his view of the facts, claiming that he caused no cognizable injuries to Respondents. Although Petitioner now seeks to call this defense "qualified immunity," it clearly is not.[14]

C. Immunity Is a Defense Only to Personal Capacity Rather than Official Capacity Claims.

It is beyond dispute that the defenses of absolute immunity and qualified immunity are available only to claims against officials in their personal capacities rather than in their official capacities. Kentucky v Graham, __US__, 105 S.Ct.3099 (1985); Owen v City of Independence, 445 US 622 (1980).

Petitioner is attempting to suggest that a finding in his favor on the issue of qualified immunity will remove him from this suit. In fact, however, a finding of absolute or qualified immunity would, at best, only resolve one of the personal, and none of the official capacity claims. It would do nothing to afford Petitioner the right recognized in Mitchell "not to stand trial under certain circumstances."

D. The Lower Courts' Denial of Petitioner's Summary Judgment Motions Premised Upon Claimed Defenses of Qualified Immunity Was Fully Appropriate in That Petitioner Submitted No Rule 56 Evidence Which in Any Way Invoked Qualified Immunity.

Petitioner produced absolutely no Rule 56 evidence which would in any way support his claimed immunity defense. A thorough examination of Petitioner's motions reveals the utter lack of any such Rule 56 evidence. In fact, Petitioner's counsel

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14 Petitioner intentionally mischaracterized his defense as "qualified immunity" because it was the only vehicle available to him with which to take advantage of Mitchell. This strategy was recognized by the Sixth Circuit and the District Court. (See Petitioner's Petition, Appendix, A-44 - 45; Petitioner's Supplemental Appendix, A-12.) In reality, Mitchell is in no way implicated in Petitioner's defense. Petitioner's Petition, Appendix, A-44 - 45; Petitioner's Supplemental Appendix, A-12.) In reality, Mitchell is in no way implicated by Petitioner.

admitted at the hearing on his "supplemental motions" that he was presenting no new evidence or arguments that were not included in his original summary judgment motion.

Petitioner now admits that nothing in his original summary judgment motion invoked the doctrine of qualified immunity. (See p. 11, n. 9 of Petitioner's Petition.) Obviously, if the Rule 56 evidence attached to the original summary judgment motion did not even raise an immunity defense, then that same evidence cannot later be sufficient to support a grant of summary judgment based upon a claim of immunity. Thus, review by this Court is unwarranted since no Rule 56 immunity evidence was ever presented.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SERVICE

A copy of the foregoing was sent by first class United States mail, postage prepaid on this 24th day of January, 1987 to Stuart Friedman, Irving Berger, Marilyn Zack and Nick Tomino at City Hall Room 106, 601 Lakeside Avenue, Cleveland, Ohio 44113; Paul Lefkowitz at The Halle Building, 1228 Euclid Avenue, Suite 900, Cleveland, Ohio 44115-1802; and to Charles Riehl and Mary Balasz, 1215 Terminal Tower, Cleveland, Ohio 44113.

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